82-27

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

MARINA POINT, LTD., a limited partnership without subsidiaries or affiliates,

Petitioner,

v.

STEPHEN WOLFSON AND LOIS WOLFSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

RICHARD F. HAMLIN
4519 Admiralty Way
Suite 208
Marina del Rey, California 90291
Telephone: (213) 822-2676
Counsel for Petitioner

Westside Law Publishers Santa Monica, California (213) 450-1965

QUESTIONS PRESENTED

1. Do the provisions of California law regarding the appointment of interim Supreme Court Justices violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States?

2. Did the decision of the Supreme Court of the state of California violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States by deciding the case based upon evidence not presented to the trial court without giving the petitioner the opportunity to cross-examine that evidence, by ignoring the findings of fact of the trial court and by enunciating one standard of interpretation for a state penal statute, but applying a different and vague standard to the facts of this particular case?

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STEPHEN WOLFSON AND LOIS WOLFSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Marina Point, Ltd., pursuant to the authority of 28 *United States Code*, § 1257, hereby petitions this court for a Writ of Certiorari to the Supreme Court of the State of California to review the decision of that Court in *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, 180 Cal.Rptr. 496. All parties to the court proceeding below are named in the caption. The grounds for this petition and the supporting points and authorities are set forth below.

QUESTIONS PRESENTED

1. Do the provisions of California law regarding the appointment of interim Supreme Court Justices violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States?

2. Did the decision of the Supreme Court of the state of California violate the guarantees of due process afforded by the Fourteenth Amendment to the Constitution of the United States by deciding the case based upon evidence not presented to the trial court without giving the petitioner the opportunity to cross-examine that evidence, by ignoring the findings of fact of the trial court and by enunciating one standard of interpretation for a state penal statute, but applying a different and vague standard to the facts of this particular case?

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING; JURISDICTIONAL STATEMENT.

STATEMENT OF THE CASE

This is an unlawful detainer proceeding based upon the respondent tenants' refusal to leave an apartment at the expiration of their lease. Petitioner filed an action in the Municipal Court. After trial, findings of facts and conclusions of law, the Municipal Court entered its judgment in favor of the petitioner for restitution of the premises, damages for holding over, attorney fees and court costs.

The appellate department of the Superior Court reversed the Trial Court decision and remanded for a further determination on certain specified issues. It certified its opinion for publication, thereby indicating its opinion that the case was of sufficient importance to be reviewed by a higher court.

The Court of Appeals transferred the case to itself from the appellate department of the Superior Court and affirmed the Trial Court decision in favor of petitioner. The California Supreme Court reversed the decision of the Trial Court in a decision filed February 8, 1982.

Petitioner's Petition for Rehearing was timely filed February 23, 1982. The California Supreme Court extended its time to rule on the Petition for Rehearing by thirty days and, ultimately, denied the Petition for Rehearing, entering its order for reversal of the trial court decision on April 9, 1982.

STATEMENT OF THE FACTS

The Wolfsons rented an apartment from Marina Point, Ltd. (herein "MPL"). The lease prohibited occupancy of the apartment by minors. The Wolfsons had a baby, but concealed the fact of the birth from MPL. Still concealing the fact that they had a three-month old infant living with them, the Wolfsons renewed the lease, the renewal again prohibiting occupancy of the apartment by minors. When they signed the renewal lease, the Wolfsons knew that the minors were prohibited and during the term of the lease represented to MPL that their infant was "just visiting."

Upon learning that the Wolfsons had a child living with them, MPL declined to renew the Wolfsons' lease, but did grant two short extensions of their tenancy to allow them to find a new apartment. The Wolfsons refused to move and MPL filed an action for unlawful detainer to recover possession of the premises.

The Wolfsons alleged as an affirmative defense that their exclusion violated the Unruh Civil Rights Act (*California Civil Code*, § § 51 *et seq.*). This act prohibits discrimination based upon sex, color, race, religion, ancestry or national origin, and has been interpreted by

the California Supreme Court as prohibiting all forms of arbitrary discrimination, *In Re Cox*, (1970) 3 Cal. 3d 205, at 216, 90 Cal.Rptr. 24. The full text of the relevant Civil Code sections are set forth in the appendix.

Following the trial, the trial court found, inter alia, that,

> "26. When children live at an apartment complex, they cause more damage to apartments and landscaping than adults and children are noisier and more disruptive to other tenants than adults and children cause higher maintenance costs than adults.
>
> "27. Children are rowdier, noisier, more mischievious and more boisterous than adults.
>
> "28. The facilities at Marina Point, Ltd. are designed for use by adults, not children, impose dangers to children who are not accompanied by adults.
>
> "29. The plaintiff Marina Point, Ltd.'s exclusion of children from the premises at issue herein is rationally related to the lack of facilities provided for children, to the noise and damage caused by children and proceeds from a reasonable economic motive to promote a quiet and peaceful environment free from noise and damage caused by children."

Based on these findings, the Trial Court concluded that the refusal of MPL to renew the Wolfsons' lease was not arbitrary discrimination which violated the Unruh Act.

The Trial Court rejected findings proposed by the Wolfsons to the effect that families with children are excluded from sixty percent to eighty percent of available rental housing throughout major metropolitan areas of the state. In its decision, the California Supreme Court refused to follow its usual practice that the evidence must

be interpreted most favorably to the respondent (petitioner herein) and that the inferences drawn therefrom by the Trial Court should not be disturbed on appeal, *In Re Marriage of Mix*, (1975) 14 Cal. 3d 604, at 614.

When it decided the case, the majority on the California Supreme Court included two interim justices appointed by the Chief Justice. Both of these interim justices sided with the Chief Justice as has occurred in over ninety percent of her appointments.

The issue concerning appointment of interim justices was first raised in a "Supplemental Brief in Support of Petition for Rehearing" which was lodged with the clerk of the court on March 2, 1982, during the pendency of the Petition for Rehearing. The clerk refused to "file" the supplemental brief but indicated that he would forward it to the Chief Justice.

The issue concerning denial of cross-examination and consideration by the court of evidence outside the record as a denial of due process was specifically raised in "Respondent's Reply to Appellant's Supplemental Brief and to Amici Curiae Briefs" pp. 22-28 and in "Respondent's Petition for Rehearing".

Each and every brief filed by the Petitioner in the lower courts urged the reviewing court to follow the usual rules of appellate procedure and affirm the judgment if the Trial Court's findings were supported by substantial evidence. The Supreme Court's failure to do so was identified as a specific violation of the Fourteenth Amendment due process clause in "Respondent's Petition for Rehearing".

ARGUMENT

I.

THE PROVISIONS OF CALIFORNIA LAW REGARDING APPOINTMENT OF INTERIM SUPREME COURT JUSTICES VIOLATE THE GUARANTEES OF DUE PROCESS AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The essence of procedural due process is a fair hearing in a fair tribunal, *In Re Murchison*, (1955) 349 U.S. 133, at 136, 99 L.Ed. 942, at 946. In determining that the Wisconsin Board of Medical Examiners could both investigate and adjudicate instances of medical misconduct, this court observed,

> "Not only is a biased decision-maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.' (Citations). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." *Withrow v. Larkin*, (1975) 421 U.S. 35 at 46, 43 L.Ed. 2d 712, at 723, 95 S.Ct. 1456.

This court concluded that the combination of investigative and adjudicative functions does not, in itself, violate due process, but observed that the "special facts and circumstances" of a given case might lead to the conclusion that the risk of the unfairness was intolerably high.

This court has found that in certain situations, the risk of bias is so great that prejudice should always be presumed. This is true with respect to decision-makers who have a pecuniary interest in the outcome of the litigation, see *Gibson v. Berryhil* (1973) 411 U.S. 564, 36 L.Ed. 2d 488, 93 S.Ct. 1689, or who have been reviled by the party before them, see *Mayberry v. Pennsylvania*, (1971) 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499, or who has been directly involved in the case, see *Morrissey v. Brewer*, (1972) 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593. Although acceptable in *Withrow, supra,* there have been other circumstances where the combination of investigative and judicial powers are unacceptable.

In Re Murchison, (1955) 349 U.S. 133 at 136, 99 L.Ed. 942 at 946, involved a state statute which gave the trial judge certain "grand jury" powers. The judge questioned a police officer, accused him of perjury, tried him for contempt, held the hearing himself and sentenced the officer for contempt. This court rejected that approach observing that if the same judge is allowed to hear the contempt charge and try it, then either the defendant is deprived of the right of cross-examination or is put to the spectacle of a judge determining the truth of his own testimony.

As with attorneys, it is not sufficient for judges to avoid actual misconduct. The American Bar Association *Canons of Judicial Ethics*, Canon 4, states in part that a judge's official conduct should be free from impropriety and *from the appearance of impropriety.* A similar provision has been adopted as the *California Code of Judicial Conduct*, Canon 2, which provides that a judge should avoid not only impropriety, but also should avoid *the appearance of impropriety* in all activities.

THE PROCEDURES ADOPTED BY THE STATE OF CALIFORNIA TO PROVIDE INTERIM JUSTICES PRO TEM RUNS AFOUL OF PROHIBITION AGAINST THE APPEARANCE OF IMPROPRIETY.

The *Constitution of the State of California*, Article VI, Section 6, gives the Chief Justice the power to "provide for the assignment of any judge to another court." The California Supreme Court has long held that the provision applies to the entire judicial system of the state, including the Supreme Court and, together with *California Rules of Court*, Rule 995, enables the Chief Justice to name interim judges to fill vacancies created by judges disqualified or unable to act, see *Fay v. District Court* (1927) 200 Cal. 522, at 528, 254 P. 896, at 899. Given the power to make an appointment, it is human nature to select a person who agrees with oneself, regardless of any actual bias.

I commissioned a computer study on Lexis to determine whether or not Chief Justice Bird's appointments actually tended to agree with her. As of February 24, 1982, there were twenty-six cases in which the word "Chief Justice Bird" appeared together with the words "under assignment by the chairperson of the judicial council" or "by assignment of the chairperson of the judicial council". The Wolfson case had not yet been added to the computer, but it made the twenty-seventh case. In those twenty-seven cases, Chief Justice Bird appointed a total of thirty-one interim Supreme Court Justices.

Of the thirty-one that she appointed, twenty-nine of them, or 93.5%, voted with her. The two who disagreed with her had not been reappointed as of the date of the study. In that group of cases, there were three decisions decided by a four to three vote in which the Chief Justice had appointed three interim justices. All three of the justices agreed with her. There were also three decisions decided by a five to

two vote in which the Chief Justice appointed a total of five interim justices. Four of the five justices in those decisions agreed with her. Thus, in close cases, seven out of eight of her appointments agreed with her.

In an article in 37 *Stanford Law Review* 433 entitled "The Selection of Interim Justices in California: An Empirical Study" the authors discovered that the situation was not unique to Chief Justice Bird. Chief Justices Gibson and Wright agreed with their interim justices 85% and 75% of the time respectively, while they agreed only approximately 50% of the time with the regular justices. At the time of the study, Chief Justice Bird had an agreement rate with her interim justices of 80% and an agreement rate with her regular justices of 46%. I did the February 1982 computer study before becoming aware of the Stanford Law Review article and I did not attempt to determine the Chief Justices' agreement rate with her regular justices through February 1982.

Only Chief Justice Traynor's agreement rate with interim justices was approximately the same as his agreement rate with regular justices, 32 *Stanford Law Review* 433, at 438. The authors of the law review article speculated that the low rate of agreement resulted from his practice of repeatedly assigning retired Associate Justice B. Rey Schauer to fill vacancies even though they disagreed on most legal issues.

The article points out at page 439 that, "If Chief Justices assign judges likely to vote with them, or if the public, rightly or wrongly, perceives that this happens, the court's reputation for impartial adjudication could be damaged."

I cannot state it any better than the conclusion of the Stanford Law Review article which provides,

> "The current method of filling temporary vacancies on the Supreme Court invites the appoint-

> ment of interim justices likely to vote for the position of the appointing justice. Such a practice risks bias in the particular case and threatens the court's reputation for impartiality. The benefits realized by such appointments—final resolution of legal issues and review of lower court decisions —are largely illusory because the appointed justices vote matters in only a very few cases."

The California Supreme Court recognized that fact itself in *Mosk v. Superior Court*, (1980) 25 Cal. 3d 474 at 486, 159 Cal.Rptr. 494 at 502, when it observed that it is appropriate for justices pro tem to be selected by lot in order to avoid charges of bias, prejudice or favoritism. The concern is not simply for the existence of bias, but also for the appearance thereof.

In the present case, Justice White was appointed as an interim justice to replace Justice Kaus who disqualified himself since he had participated in the Court of Appeals decision which affirmed the trial court decision. Justice Tobriner was appointed as an interim justice to fill the vacancy created by his own retirement.

Thus, two members of the five member majority had been appointed as interim justices by the questionable procedure described above. *California Constitution*, Article VI, Section 2, requires the concurrence of four justices who participated in oral argument in order to arrive at a decision. Eliminating the two interim justices also reduces the majority below that necessary for a decision.

We are aware of Justice Rehnquist's opinion denying a Motion to Recuse himself made on the grounds that he had earlier expressed an opinion on the subject matter, *Laird v. Tatum* (1973) 409 U.S. 824, at 838, 93 S.Ct. 7, at 16, 34 L.Ed. 2d 50, in which he stated that nothing guarantees a litigant that each judge will start off from dead center in

his willingness or ability to reconcile opposing arguments with his understanding of the Constitution and the law. While this may not violate the Constitution as to any individual justice who is willing to listen not only to the arguments of counsel, but also to the discussion of other justices with differing points of view, it is disasterous for a litigant if all of the justices share the same point of view.

A panel of seven Supreme Court Justices creates the opportunity for a cross-section of opinion and gives the litigant the opportunity to have a panel which is, on balance, impartial, even if individual members may have a predilection one way or the other. Hopefully, the predilections of the various individual members of the panel will offset each other.

With a manner of appointment of interim justices such as that in the California Constitution, the litigant's chances of a panel with offsetting biases are reduced. For example, in this case, it was argued for the first time in March or April of 1980. The panel remained unchanged for nearly a year, but was unable to reach a decision in this case.

Then Justice Wiley Manuel passed away and Justice William Clark resigned to join the Reagan administration in Washington. Although Justice Manuel's opinion is not known to the litigants at this time, Justice Clark had voted against granting a hearing on the issue and presumably favored the affirmance of the trial court decision.

For several months the five member court was also unable to reach a decision. We know now that Justices Richardson and Mosk favored affirming the trial court decision while Chief Justice Bird and Justices Newman and Tobriner favored the reversal.

When the new vacancies were filled, one of the new justices was Otto Kaus who had participated in the court

of appeals decision which affirmed the trial court decision. He disqualified himself, presumably because he had already expressed an opinion on the case through the Court of Appeals decision. Chief Justice Bird replaced him with Justice White who had previously voted with her in other instances when he had been appointed an interim justice.

The case was reargued in August of 1981, nearly a year and a half after the first oral argument. Before the decision was filed, Justice Tobriner resigned. Nevertheless, Chief Justice Bird appointed him to write the opinion under her authority as chairperson of the Judicial Council, *California Rules of Court*, Rule 995. Thus, this was a close case which took nearly two years after initial oral argument to decide. It seems quite possible that if Justice Manuel had survived and if Justice Clark had not resigned, the decision would have been four to three in favor of affirming the trial court. Instead, with the Chief Justice given the opportunity to name two interim justices who sided with her, as have more than 93% of the interim justices she has appointed, they reached the decision to which this petition is directed. Major issues of law should not be decided by such fortuitous events.

The method of appointing interim justices is particularly dangerous when we realize that it is subject to none of the checks or balances involved in the selection and appointment of regular justices. An interim justice needs no approval of the Judicial Council, cannot be recalled for misconduct and need not obtain the approval of the voters that is required of the other justices. Thus, the power to appoint interim justices is the unbridled power to influence the outcome of the case. It defeats the guarantee of a fair tribunal which resides in the Fourteenth Amendment due process clause.

II.

THE DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA VIOLATED THE GUARANTEES OF DUE PROCESS AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (A) BY ENUNCIATING ONE STANDARD OF INTERPRETATION FOR A STATE PENAL STATUTE, BUT APPLYING A DIFFERENT AND VAGUE STANDARD TO THE FACTS OF THIS PARTICULAR CASE AND (B) BY IGNORING THE FACTUAL FINDINGS OF THE TRIAL COURT AND DECIDING THE CASE BASED UPON EVIDENCE NOT PRESENTED AT TRIAL AND WITHOUT GIVING THE PETITIONER THE OPPORTUNITY TO CROSS-EXAMINE.

(Perspective)

Before discussing the details of this section, it will be useful to review certain decisions of the federal courts concerning age discrimination, certain state statutes which prohibit discrimination based upon age and the decisions of several of the state courts. Once these factors have been considered, it will become readily apparent that the decision of the California Supreme Court is an aberration which is made possible only by ignoring the procedural due process guarantees afforded by the Fourteenth Amendment.

I have been unable to find any decision of this court which directly considers the question of age discrimination in housing. There are two decisions by which this court has expressed its opinion that age is an appropriate basis for classification and does not constitute arbitrary discrimination. In *Brown v. Board of Education* (1954) 347 U.S. 483 at 494, 98 L.Ed. 2d 873, 880, 74 S.Ct. 686,

this court stated,

> "To separate (children) from others *of similar age and qualifications* solely because of their race generates a feeling of inferiority as to their status in the community. . ." (Emphasis added.)

This court has also found that age is not a suspect classification in *Massachusetts Board of Retirement v. Murgia* (1976) 427 U.S. 307. Thus, this court has regarded age as an appropriate, *non-arbitrary* form of discrimination.

Decisions of the Circuit Courts of Appeal have confirmed that opinion, at least by inference. In *Wharton v. Knefel* (8th Cir. 1977) 562 F. 2d 550, the court found that a lessor had engaged in racial discrimination despite her contention that her refusal to rent to a black renter was based on her preference not to rent to divorced people with teenagers. Apparently, the court would have permitted discrimination against people with teenagers, but rejected it in that case as a subterfuge for racial discrimination.

In *Smith v. Adler Realty Co.*, (7th Cir. 1971) 436 F.2d 344, the court found that a stated policy of excluding children was actually an excuse designed to avoid the appearance of illegal racial discrimination. In rejecting the excuse, the court apparently did so only because it found the excuse to be untrue. If either of these circuit courts had believed that age-discrimination was improper, they could have said so rather than stating that the excuses were an attempt to avoid charges of racial discrimination.

I have found only two circuit court decisions which directly deal with the issue of age-discrimination in housing. *Joy v. Daniels* (4th Cir. 1973), 479 F.2d 1236, deals with a low income housing rent supplement program and observes, in dicta, that an apartment owner in such a program may not discriminate against any family because

of children by reason of 24 *C.F.R.* 221.536 (1971). There is no contention made that petitioner here is providing low income or rent supplement housing.

The other case is *Halet v. Wend Investment Company*, (9th Cir. 1982) 672 F.2d 1305, 1311, which reversed a dismissal of an action which alleged that the exclusion of families with children interfered with the plaintiff's ability to raise a family. Respondent made a similar argument in this case, but the trial court rejected all findings of fact proposed on the issue by the Wolfsons as unproved, specifically finding that there are apartments available which rent to families with children.

Thus, those decisions of the circuit courts of appeal and of this court which have touched upon the subject of age discrimination have indicated that age discrimination is *not* an arbitrary or invidious form of discrimination unless specifically prohibited as in low income housing programs, unless the tenant shows that the "age discrimination" is actually a subterfuge for racial discrimination, or unless the tenant shows that the age discrimination has some other effect, such as producing racial discrimination or interfering with a family's ability to have children at all. None of those circumstances apply to the present case and, to the extent that the defendants made allegations concerning those matters, they were unable to prove them as established by the trial court's rejection of their proposed findings of fact and conclusions of law. I did not attempt to determine whether any district courts had considered the issue.

A number of state courts have considered the issue and concluded that age discrimination in housing or the exclusion of families with children from rental housing is reasonable. Those decisions include the Florida Supreme Court in *White Egret Condominium, Inc. v. Franklin*, (1979) 379 So. 2d 346, the Ohio Supreme Court in

Lamont Building Company v. Court, (1946) 70 N.E.2d 447, the Arizona courts, *Riley v. Stove* (1974) 256 P.2d 747, and the New Jersey courts in *Tax Payers Association, etc. v. Weymouth Township* (1976) 364 A.2d 1016, and *Shepherd v. Woodman Township Comm'n, etc.* (1976) 364 A.2d 1005.

There are ten state statutes which either prohibit discrimination based upon age or which prohibit the exclusion of families from rental housing for the reason that there is a child in the family. Those statutes are *Arizona Revised Statutes*, § 33-1317, *Connecticut General Statutes Annotated*, § 46a-64, *Delaware Code*, Title 25 § 6503, *Illinois Annotated Statutes*, Chapter 80 § § 37-38, *Massachusetts Annotated Law*, Chapter 151B, § 4.11 and § 4.6, *Michigan Compiled Laws Annotated*, § § 37.2102, 37.2302, 37.2502, *Montana Revised Codes Annotated*, 49-2-305, *New Hampshire Revised Statutes Annotated*, § 354-A:8V, *New Jersey Statutes Annotated*, 10:5-4, *New York Real Property Law*, § § 236 and 237.

I have found no challenges to the state statutes which prohibit age discrimination, but presumably each was adopted by the local legislature after determining that there was a problem which could be solved by such a statute. In the present case, no such statute exists. As discussed in the statement of facts, the Unruh Act has been interpreted to prohibit all arbitrary discrimination. In 1971, a California court found that age discrimination in housing was not arbitrary, *Flowers v. John Burnham & Company* (1971) 21 Cal.App. 3d 700, at 703, and approved the exclusion of a particular class of children, boys over five. After *Flowers*, the legislature amended the Unruh Act to prohibit discrimination based upon sex, but made no mention of prohibiting discrimination based upon age.

In fact, several bills were introduced in successive legislatures to attempt to prohibit age-related discrimin-

ation in housing. Each and every one of those bills failed of passage. Thus, the California Supreme Court is the only court in the nation to find age discrimination in housing to be arbitrary in the absence of a prohibiting statute or regulation and in the absence of any finding that the age discrimination was a subterfuge for some prohibited type of discrimination. It has reached this result only by ignoring its usual rules of appellate review and riding roughshod over the procedural due process guarantees which are necessary to produce a fair trial in a fair tribunal.

A. (The California Supreme Court Has Enunciated One Definition Of "Arbitrary" But Has Applied A Different Definition To The Facts Of This Case And Has Made A Penal Statute Too Vague To Satisfy Due Process Requirements.)

Earlier interpretations of the Unruh Act prohibited all forms of *arbitrary* discrimination. At page 20 of its slip opinion, the majority indicated that the public accomodations statutes have uniformly proscribed exclusions "on the basis of purely *arbitrary* classifications." (Emphasis added.)

Near the bottom of page 20 of the slip opinion, the majority speaks of the legislative confirmation of the court's interpretation of the Unruh Act as "barring all forms of *arbitrary* discrimination" (Emphasis added). It finds this legislative approval from a 1974 amendment to the Unruh Act which was made after *In Re Cox*, 3 Cal. 3d 205, 90 Cal.Rptr. 24, which held that the Unruh Act barred all forms of arbitrary discrimination.

The Court then announces at page 21 of its slip opinion the "well-established principle" of statutory construction that a legislative amendment of a statute without altering

portions of the provisions that have already been judicially construed, there is a presumption that the legislature has been aware of and acquiesed in the previous judicial construction. Yet the 1974 Amendemnt of the Unruh Act also came after the decision of the court of appeals in *Flowers v. John Burnham Company,* (1971) 21 Cal.App. 3d 700, 98 Cal.Rptr. 644, which expressly approved age discrimination in rental housing.

If a court follows a rule of statutory construction when convenient to the decision it wishes to reach, but ignores the same rule of statutory construction when inconvenient, the litigant involved has been denied procedural due process. If the legislature must be presumed to be aware of the court's decision in *Cox* prohibiting all forms of arbitrary forms of discrimination, it must have also been aware of the appellate court's decision in *Flowers* holding that age discrimination was not arbitrary. Indeed, if we follow the definition of "arbitrary" enunicated even in Wolfson, we find that the California Supreme Court applied a different definition to the facts of this case.

As recently as *Cox* the California Supreme Court observed that a reasonable classification having a substantial relation to a legitimate objective under a sufficiently definite standard is reasonable, *In Re Cox,* 3 Cal. 3d at 215, fn. 9 (in connection with a discussion of equal protection). Later in the decision, the majority made it clear that there can be reasonable classifications, including age-restrictive classification in connection with housing for the elderly. The majority did not overrule *Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal. 3d 736, 13 Cal.Rptr. 201, 361 P. 2d 921, which approved as reasonable a California Horse Racing Board Regulation which prohibited persons who had been convicted of bookmaking from participating in any pari-mutuel wagering, although this case was specifically called to the Court's

attention. Nothing in the California Supreme Court opinion holds that the Unruh Act requires a classification to be perfect, only that it be one which promotes a legitimate objective.

Yet, when it nears its conclusion, the majority states at page 37 of the slip opinion that,

> "Marina Point cannot possibly claim that its exclusionary policy serves any similarly *compelling societal interest.*" (Emphasis added.)

If Marina Point has a legitimate objective and if the means which it has adopted is reasonable related to that objective, then its conduct is not arbitrary. If the California Supreme Court wishes to adopt a strict scrutiny interpretation of "arbitrary" as used in the Unruh Act, then it should do so clearly. It should not be allowed to announce a rational relationship test and then find that a litigant failed to satisfy a strict scrutiny test. To do so deprives that litigant of fundamental due process.

The majority also created an intolerably vague penal statute when it excluded housing for the "elderly" from the general prohibition against age discrimination. The Massachusetts statute described above defines elderly as over sixty-five; the Michigan statute defines senior citizen housing as being fifty years of age or older, *Michigan Compiled Laws Annotated,* § 37.2503(1)(c). Despite a statute which prohibits age discrimination in public accomodations and in real property, the New Jersey court has approved a municipal ordinance which permitted a mobile home park to be limited to a family in which the head of the household or spouse was fifty-two years of age or older, *Taxpayers Association of Weymouth Township v. Weymouth Township,* (1976) 71 N.J. 249, 364 A. 2d 1016, cert. den. 430 U.S. 977, 52 L.Ed. 2d 373, 97 S.Ct. 1672. The volume containing the Illinois statute was

missing from the library during the time of my research for this matter and I am uncertain as to its provisions, but it was not cited in Shephard's in any federal case.

Thus an apartment owner may maintain housing for the "elderly" if able to figure out what that is. A wrong guess subjects the owner to the penal provisions of *California Civil Code*, § 52, which provides for treble damages. An apartment owner is not told the age at which he may begin excluding infants. If he begins at fifty and a court later holds that that is too young to be considered elderly, then the owner is subject to the penal provisions of the act.

> "That the terms of the penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. (Citations)" *Connally v. General Construction Company* (1965) 269 U.S. 385, at 391, 70 L.Ed. 322, at 328, 46 S.Ct. 126.

B. (The California Supreme Court Decided The Case By Ignoring The Factual Findings Of The Trial Court And By Relying Upon Evidence Not Presented To The Trial Court, Without Giving Petitioner The Opportunity To Cross-Examine.)

Even assuming that the California Supreme Court has properly enunciated a strict scrutiny standard for Unruh Act review, or a standard which precludes any classifica-

tion for businesses subject to the Unruh Act, it could not reach its decision except by ignoring the findings of the trial court and by relying upon evidence which was never introduced at the trial. This violates due process both by applying a unique set of rules for appellate review to this case and by denying petitioner the opportunity to cross-examine the evidence upon which the Supreme Court relied in reaching its decision.

The most egregious example of this occurs at page 38 of the slip opinion, wherein the majority concludes that the exclusion of children somehow exacerbates the state's housing problems. Such findings were requested by the Wolfsons, but rejected by the trial court. Indeed the testimony of witnesses for both the Wolfsons and the petitioner agreed that requiring apartment owners to rent to families with children would be a form of governmental regulation which would reduce the desirability of building additional rental units and would therefore exagerate any housing shortage which may exist. This testimony was dismissed at oral argument by one of the majority justices who said something to the effect that expert opinion should be disregarded since experts can be found who will testify to anything.

Such an attitude illustrates the utter disregard that the majority have for the fact finding process. The normal rule is that where there is conflicting evidence, all doubts shall be resolved in favor of the trial court's decision. It is the prerogative of a trier of fact to refuse to believe witnesses. Where two or more inferences can reasonably be deduced from the facts, the trial judge may draw such inferences as may be reasonable to him and the reviewing court is without power to substitute its deductions for those of the trial court, *In Re Marriage of Mix*, (1975) 14 Cal. 3d604, at 614, 122 Cal.Rptr. 79, at 85-86, 536 P. 2d 479, *Greening v. General Air Conditioning Corporation*, (1965) 233 Cal.App. 2d 545, at 550, 43 Cal.Rptr. 662.

The California Supreme Court simply ignored the factual findings of the trial court that the petitioner had a legitimate objective, the preservation of its property and a peaceful and quiet environment and that the exclusion of children was rationally related to that objective. The Supreme Court found instead that the petitioner had no compelling societal interest in excluding children, in part because such an exclusion would exacerbate the state's housing problems despite the fact that the trial court had rejected similar findings requested by the Wolfsons and despite the fact that the testimony of witnesses for both the petitioner and the Wolfsons agreed that requiring apartment owners to rent to families with children would exacerbrate whatever housing shortage may have existed at the time.

Moreover, the majority went beyond the evidence introduced at trial in reaching its decision. At pages 10 and 11 of the slip opinion, the court described certain studies which "revealed" that families with children are excluded from sixty to eighty percent of the available rental housing. None of those studies were introduced at the time of trial and the petitioner has never had the opportunity to cross-examine the authors of those studies with the exception of two authors of a single study who testified at the trial. The trial court rejected proposed findings by the defendant based upon the testimony of those two authors.

The majority also relies upon a series of law review articles. Although the trial occurred in the Fall of 1977, the earliest law review article was published in June 1978. The *Loyola University of Los Angeles Law Review* article reveals at footnote 14 that the author's statistics came in part from a telephone interview with Messrs. Wolfson and his attorney Gratz, as well as other people opposing adult-only housing. The law review article does not report any attempt to interview anyone who might present the petitioner's point of view.

In Gerald Travalio's article, 40 *Ohio State Law Journal No. 2*, 295 at 296, he stated that he intended to examine the *Federal Constitutional* aspects of age-restricted housing. He began his article by acknowledging that, "while it will become apparent. . .that certain empirical data are necessary to the legal result, *I have made no effort to acquire that data* for purposes of this article.. . ." (Emphasis added.) Mr. Travalio acknowledged that the shortage of rental housing available to families with children is an assertion and then discussed the asserted facts as though proved. Although nominally not deciding the case on the basis of federal constitutional issues, the court relied on these unverified facts in writing its opinion.

If an appellate court can consider any fact it wishes, regardless of whether or not it has been introduced into evidence, the court can produce any result which it desires. If a litigant can be precluded in this fashion from cross-examining witnesses, that litigant will be deprived of any opportunity to test the credibility of the witnesses, their bias or other improper motives. In short, by going beyond the record at trial, the majority has deprived petitioner of one of the most important safeguards of the integrity of the fact-finding process in the form of the right of cross-examination, an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal, *Pointer v. Texas* (1965) 380 U.S. 400, at 405.

CONCLUSION

During oral argument of a post Supreme Court decision motion, counsel for the Wolfsons observed that,

> "Justice Tobriner fell out of his chair to avoid mentioning the federal constitution. As fas as he was concerned it did not exist."

That is as near an exact quote as memory permits, but the gist of it is certainly accurate. It also summarizes accurately what is wrong with the majority's opinion; it ignores the Constitution of the United States and the procedural safeguards which are afforded to litiants by the Fourteenth Amendment due process clause.

A civil litigant is no less entitled to procedural due process than a criminal defendant. This means, at a minimum, that the state Supreme Courts should decide cases based upon the facts in the record where the parties have had the opportunity to conduct cross-examination of witnesses and to respond with rebuttal testimony. If an appellate court can rely upon studies made after the trial, ignore the testimony of witnesses for both parties and pretend that the trial court findings were never made, the court can reach any predetermined result which it desires.

The problem is exacerbated by, or perhaps caused by, the provisions of the California Constitution which provide for the appointment of interim justices to fill temporary vacancies. The Chief Justice can, and usually does, name interim justices to fill temporary vacancies. The Chief Justice can, and usually does, name interim justices who are likely to agree with her. This results in a panel which is far more likely to have several members with the same preliminary biases than a panel which has been selected by the usual procedures. All of these have combined in this case to deprive petitioner of a fair trial in a fair tribunal and justifies the issuance of a Writ of Certiorari in this case.

Dated: June 30, 1982

Respectfully submitted,

RICHARD F. HAMLIN
Attorney for Petitoner

SUPREME COURT
FILED
FEB 8 1982
LAURENCE P. GILL, Clerk
Deputy

In the Supreme Court of the State of California

MARINA POINT, LTD.,

Plaintiff and Respondent,

v.

STEPHEN WOLFSON et al.,

Defendants and Appellants.

L.A. 31199

(Muni. Ct., Culver Jud. Dist. No. A15829)

In this case we must determine whether, under California law, an owner of an apartment complex may lawfuly refuse to rent any of its apartments to a family solely because the family includes a minor child. In the landlord's action to eject the family, the municipal court, found, inter alia, that "[c]hildren are rowdier, noisier, more mischievous and more boisterous than adults," and upheld the landlord's policy of excluding all families with minor children. The tenants now appeal from the judgment in favor of the landlord, contending that the exclusionary policy violates their statutory rights under the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the California Fair Housing Law (Health & Saf. Code, § 35700 et seq.) and, in addition, impermissibly infringes upon their state and federal constitutional rights of familial privacy (U.S. Const., 9th & 14th Amends., Cal. Const., art. I, § 1) and equal protection of the law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

For the reasons discussed below, we have concluded that the landlord's broad, class-based exclusionary practice violates the Unruh Civil Rights Act (hereafter Unruh Act or act); in light of this conclusion, we have no occasion in this case to address any of the tenants' more sweeping and far-reaching constitutional contentions. As we shall explain, the municipal court, in finding the challenged practice compatible with the Unruh Act, proceeded from the erroneous premise that under that act "[n]ot

every class. . .is protected from exclusion," but rather that "[i]t is only such class. . .that is protected as is set forth in the [s]tatutes or who come under the [s]tatutes by judicial determination." Finding that "[t]here is no decision to include children, parents with children, or families with children, as a protected class by the wording of the [s]tatutes themselves or by judicial determination," the court concluded that the challenged practice fell outside the scope of the act.

As we shall point out, the municipal court's approach conflicts with the interpretation of the Unruh Act unanimously adopted by this court a decade ago in In re Cox (1970) 3 Cal.3d 205. In *Cox*, after reviewing the origin, legislative evolution and prior judicial decisions construing the Unruh Act and its predecessors, our court concluded that the "identification of particular bases of discrimination—color, race, religion, ancestry and national origin—[in the current version of the act]. . . *is illustrative rather than restrictive.*" (Italics added.) (3 Cal.3d at p. 216.) Although we recognized that in recent years the act had been invoked most often "by persons alleging discrimination on racial grounds," we emphasized that the act's "language and its history compel the conclusion that the Legislature intended to prohibit *all* arbitrary discrimination by business establishments." (Italics added.) (*Id.*) Thus, contrary to the municipal court's conclusion, the fact that the landlord's exclusionary policy in this case discriminated against children and families with children, rather than a specific racial or religious group or some other classification specifically involved in a prior judicial decision, does not place the exclusionary practice beyond the reach of the Unruh Act.

The landlord maintains, however, that even if the municipal court did err in its analysis of the Unruh Act, we should nevertheless affirm the trial court judgment on the grounds that the exclusionary policy at issue is "reasonable," not "arbitrary," and hence not violative of the Unruh Act. Relying, inter alia, upon the court's finding that "[c]hildren are rowdier, noisier, more mischievous and more boisterous than adults," the landlord claims that it may seek to achieve its legitimate interest in a quiet and peaceful residential atmosphere by excluding *all* minors from its housing accommodations, thus providing its adult tenants with a "child free" environment.

As we shall explain, however, the landlord's argument overlooks the individual nature of the statutory right of equal access to business establishments that is afforded "all persons" by the Unruh Act. Derived from the early common law right of equal access to the services of innkeepers or common carriers, the Unruh Act prohibits business establishments from withholding their services or goods from a broad class of individuals in order to "cleanse" their operations from the alleged characteristics of the members of an excluded class.

As our prior decisions teach, the Unruh Act preserves the traditional broad authority of owners and proprietors of business establishments to adopt reasonable rules regulating the conduct of patrons or tenants; it imposes no inhibitions on an owner's right to exclude any individual who violates such rules. Under the act, however, an individual who has committed no such misconduct cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group. Whether the exclusionary policy rests on the alleged undesirable propensities of those of a particular race, nationality, occupation, political affiliation, or age, in this context the Unruh Act protects individuals from such arbitrary discrimination.

Accordingly, we conclude that the judgment in favor of the landlord should be reversed.

1. The Facts And Proceedings Below.

Plaintiff Marina Point, Ltd. (hereafter landlord or Marina Point) is a privately owned apartment complex, which, at the time of trial, consisted of 846 separate apartment units. The apartment complex, located in Marina del Rey, an unincorporated area in the County of Los Angeles, stands on land owned, and leased by the county to Marina Point. The master lease between the county and Marina Point specifically forbids Marina Point from discriminating on the basis of race, religion or national ancestry, but contains no provision with respect to other forms of discrimination.

In January 1974, defendants Stephen and Lois Wolfson signed a one-year lease for an apartment in the Marina Point complex with occupancy to begin on February 1 of that year. Although the printed form lease that the Wolfsons then signed

contained a clause which provided that no minors under the age of 18 could reside in the leased premises without the landlord's written permission, Marina Point acknowledges that at that time it followed a policy of renting its apartments to families with children as well as to families without children.

In October 1974, Marina Point altered its rental policy with the objective of ultimately excluding all children from the apartment complex. At that time, well over 60 families with children lived in apartments in the complex, and Marina Point decided that while it would allow the children already there to remain, it would not rent any apartments to new families with children or with pregnant women.

In February 1975, the Wolfsons renewed their lease for a one-year period; the form lease again contained the same clause with respect to children as had appeared in the initial lease. In September 1975, Lois Wolfson gave birth to a son, Adam, who thereafter resided with his parents in the family apartment in Marina Point. In February 1976, the Wolfsons renewed their lease for another year; although the lease again contained the identical clause as to written consent for children, the Wolfsons apparently did not specifically inform the landlord of Adam's presence, and the lease made no reference to him.

In the fall of 1976, the landlord's manager learned that the Wolfsons had a child living in the apartment; shortly thereafter, the landlord informed them that their lease, due to expire on January 31, 1977, would not be renewed, and that the sole reason for such nonrenewal was Adam's presence on the premises.

After some negotiation between the parties, Marina Point agreed to a three-month extension of the Wolfsons' lease; the new lease agreement, which again contained the same provision as to children, specified that the premises would be occupied by the Wolfsons and their son. Thereafter, upon the Wolfsons' request, the landlord agreed to an additional one-month extension of the lease to May 31, 1977.

When the Wolfsons failed to vacate the premises on May 31, the landlord commenced the present unlawful detainer action in municipal court. In their answer, the Wolfsons maintained that the landlord's policy of discriminating against families with children violated both statutory constitutional prescriptions,

and, as such, did not provide a lawful basis for their eviction. The landlord acknowledges that if its exclusion of the Wolfsons does in fact contravene statutory or constitutional strictures, such illegality would indeed provide a valid defense to the unlawful detainer action. (See, e.g., S.P. Growers Assn. v. Rodriguez (1976) 17 Cal.3d 719, 724; Schweiger v. Superior Court (1970) 3 Cal.3d 507; Abstract Investment Co. v. Hutchinson (1962) 204 Cal.App.2d 242.)

At trial, the landlord conceded that its nonrenewal of the Wolfsons' lease rested solely on its current general policy of refusing to rent any of its apartments to families with children, but the landlord denied that this policy violated any statutory or constitutional principle. In defense of its exclusionary policy, the landlord's apartment manager testified that the decision to bar families with children rested in part on a number of past instances in which young tenants had engaged in annoying or potentially dangerous activities, ranging from acts of arson to roller skating and batting practice in the hallways to the attempted solicitation of snacks from the landlord's office staff.

The manager did not indicate, however, what proportion of the tenant chaildren engaged in such activities or what steps, short of the blanket exclusionary policy, the lan[illegible]d had implemented to deal with the problem, such as promulgating general rules as to permissible and impermissible conduct or excluding from the complex those families whose children repeatedly committed disruptive or destructive acts. Moreover, the landlord introduced no evidence that the Wolfsons' child had ever engaged in any such activity and, indeed, two of the Wolfsons' immediate neighbors testified that Adam's presence was not annoying to them at all.

As an additional explanation for the exclusionary policy, the apartment manager testified that the Marina Point complex had no special facilities for children, such as playground equipment, and no suitable area for children to play. The manager conceded, however, that the facilities of the complex had remained unaltered since the landlord had implemented its "no children" policy. In addition, the evidence revealed that, even at the time of trial, seven children were still living in apartments in the Marina Point complex.

Finally, the landlord presented testimony of two expert witnesses who had been in the real estate business for many years. These witnesses testified that in their opinion children, as a class, generally cause more wear and tear on property than adults do, and that as a consequence, landlords who rent to families with children generally have higher maintenance costs than landlords who exclude children. The witnesses presented no statistical data in support of their conclusion, but simply testified on the basis of their general experience.

As already noted, two immediate neighbors of the Wolfsons, one living next door and one living overhead, testified on behalf of the Wolfsons that they had not been disturbed by Adam's presence in the apartment. In addition to these neighbors' testimony, the Wolfsons presented one expert witness, a professor of real estate finance at California State University at Fullerton, who testified that the basic profitability of operating an apartment complex does not generally vary with the type or age of its tenants. Finally, the Wolfsons introduced a number of recent studies by various groups documenting the extensive nature of the practice of discrimination against families with children in rental housing that currently exists throughout California. As these and more recent studies reveal, in many of the major metropolitan areas of the state, families with children are excluded from 60 to 80 percent of the available rental housing.[1]

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[1]See, for example, Note, *Landlord Discrimination Against Children* (1978) 11 Loyola L.A.L.Rev. 609, 611-613; Ashford & Eston, The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities (1979); City of Campbell, Survey of Rental Policies Relating to Families with Children (1979); City of Mountain View, Children in the Housing Market (1978).

Similar discrimination in rental housing against families with children apparently exists in many regions throughout the country. (See, e.g., Reid et al., Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area (1979); Greene, Child Discrimination in Rental Housing: A Comparative Analysis of Apartment Policies in Dallas, Texas (1979); Travalio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing* (1979) 40 Ohio St.L.J. 295, 296-297; O'Brien & Fitzgerald, *Apartment for Rent-Children Not Allowed* (1975) 25 DePaul L.Rev. 64, 74-86.)

At the conclusion of the trial, the municipal court ruled in favor of Marina Point, rejecting the Wolfsons' contention that the landlord's policy of excluding all families with children violated their statutory or constitutional rights. The court's formal findings of fact contain findings, inter alia, that the landlord's "exclusion of children. . .proceeds from a reasonable economic motive to promote a quiet and peaceful environment free from noise and damage caused by children. Yet the court's memorandum opinion reveals that the court's *legal* conclusion that the practice in question did not violate any prohibited discrimination rested on the erroneous belief that the statutory proscription of discrimination applied only to a limited number of specifically designated "protected classes."[2] Because the municipal court could find "no decision to include children, parents with children, or families with children, as a protected class by the wording of the statutes themselves, or by judicial determination," the court concluded that the exclu-

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[2]The municipal court's memorandum opinion states in relevant part:

"The Unruh and Rumford Acts, taken collectively establish a classification of person[s] protected from discrimination in housing and business establishments. This classification includes persons discriminated against on the basis of race, religion, [national] origin, ancestry, sex and marital status. By judicial construction, this protection has been extended to homosexuals, long hairs, persons of unusual dress, persons of unusual political views, and unmarried couples living together. [Citation.]

"Not every class or person is protected. It is only such class or person that is protected as is set forth in the Statutes or who come under the Statutes by judicial determination. There is no decision to include children, parents with children, or families with children, as a protected class by the wording of the Statutes themselves, or by judicial determination. [¶] . . . The Court finds that the California Statutes do not extend protection to persons in the class of defendants who are refused housing on the ground that they have a child . . .

"[T]he Court . . . is not indifferent to the plight of the defendants and other similarly situated persons as parents or families with children. The Court is satisfied that there is a problem of major importance; that there is difficulty in obtaining housing where one has a child. The judgment of the Court in no way is to be interpreted as 'Closing one's eyes to the problem.' However, the Court is restricted to a judicial determination as the law now exists under the provisions of the applicable statutes and case law. The Court finds that there is no case law or statute placing defendants in any protected class as parents of children."

sionary practice challenged in this case fell beyond the reach of the state's existing anti-discrimination statutes. The court accordingly entered judgment in favor of the landlord, awarding it possession of the premises, $1,903.50 in damages, $3,000 in attorney fees and costs.[3]

The Wolfsons now appeal from the judgment, asserting that both the Unruh Act and the Fair Housing Law bar the landlord's admitted policy of discriminating against families with children. They additionally contend that the exclusion violates their rights to familial privacy and equal protection of the law guaranteed by the state and federal Constitutions. As noted above, because we conclude that the landlord's exclusionary policy violates the Unruh Act we need not, and do not, reach the Wolfsons' additional contentions.

2. Contrary To The Municipal Court's Conclusion, The Antidiscrimination Provisions Of The Unruh Act Are Not Confined Only To A Limited Category Of "Protected Classes" But Rather Protect "All Persons" From Any Arbitrary Discrimination By A Business Establishment.

In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the

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[3] After judgment was entered in favor of the landlord, the Wolfsons sought a stay of execution from the trial court pending appeal. The trial court issued a temporary stay for six months, and at the expiration of that period the Wolfsons vacated the premises. This vacation of the apartment does not render the appeal moot, however, in light of the outstanding judgment for damages, attorneys' fees and costs, as well as the general importance of the underlying issue. (See Green v. Superior Court (1974) 10 Cal.3d 616, 622, fn. 6.)

Unruh Act, Civil Code section 51.[4] Emanating from and modeled upon traditional "public accommodations" legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include "all business establishments of every kind whatsoever." (See generally Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Interpretation* (1960) 33 So.Cal.L.Rev. 260, 272-294.)

For nearly two decades the provisions of the Unruh Act, in light of its broad application to "all business establishments," have been held to apply with full force to the business of renting housing accommodations. (See, e.g., Swann v. Burkett (1962) 209 Cal.App.2d 685; Abstract Investment Co. v. Hutchinson, *supra*, 204 Cal.App.2d 242, 254-255; 56 Ops.Cal.Atty.Gen. 546 (1973); cf. Burks v. Poppy Construction Co. (1962) 57 Cal.2d 463, 467-471.) Indeed, in the case at bar, Marina Point apparently concedes that, like other business establishments that deal with the public, its freedom or authority to exclude "customers," i.e., prospective tenants, from the goods and services it offers, i.e., rental units, is limited by the provisions of the Unruh Act.[5]

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[4]Section 51 presently provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever.

"This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry or national origin."

Unless otherwise noted, all statutory references are to the Civil Code.

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[5]The fact that the landlord in this case is also subject to the specific antidiscrimination provisions of the California Fair Housing Law in no way diminishes the applicability of the Unruh Act. Section 35743 of the Health and Safety Code, one of the provisions of the Fair Housing Law, explicitly provides in this regard: "Nothing contained in this part shall be construed to, in any manner or way, limit the application of Section 51 of the Civil Code." (See also Health & Saf. Code, § 35788; Burks v. Poppy Construction Co., *supra*, 57 Cal.2d 463, 469-470.)

The municipal court properly recognized that Marina Point, as a "business establishment," was generally subject to the Unruh Act. It concluded, however, that the act provided no protection to the Wolfsons because it found that the subjects, i.e., "victims," of the discriminatory practice in this case, described variously as "children" or "families with children," did not fall within what the court believed to be a limited set of "protected classes" shielded from discriminatory treatment by the act. As already noted, the court, in elaborating upon its understanding of the Unruh Act, stated in this regard: "Not every class is protected. It is only such class or person that is protected as is set forth in the Statutes or who come under the Statutes by judicial determination." Because discrimination against children or against families with children was not in explicit terms proscribed by the language of section 51 or by any prior judicial decision, the court determined that any such discrimination was beyond the scope of the act.

The municipal court's interpretation of the act directly conflicts with this court's interpretation of the Unruh Act a decade ago in In re Cox, *supra*, 3 Cal.3d 205. In *Cox*, an individual who claimed that he had been excluded from a shopping center because a friend with whom he was talking "wore long hair and dressed in an unconventional manner" (3 Cal.3d at p. 210), asserted that such exclusion was barred by the Unruh Act. Relying upon the fact that the act, by its terms, expressly referred only to discrimination on the basis of "race, color, religion, ancestry or national origin,"[6] the city argued in response that the act's proscriptions were limited to discrimination which was based on the specifically enumerated forbidden criteria, and did not encompass the alleged discrimination against "hippies" or their associates.

After reviewing the common law origin, the legislative history and the past judicial interpretations of the act and its statutory predecessors, our court unanimously concluded in *Cox* that the

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[6]Subsequent to our decision in *Cox*, the Legislature added "sex" to the bases of discrimination specifically listed in the statute. (Stats. 1974, ch. 1193, § 1, p. 2568.) The purpose and legislative history of the 1974 legislation is discussed below. (See *post*, pp. _____.)* With the exception of this single addition, the current statute is identical to the provision as construed in *Cox*.

*Typed opinion at pages 21-23.

"identification of particular bases of discrimination—color, race, religion, ancestry, and national origin— . . . *is illustrative rather than restrictive.* [Citation.] Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments.*" (Italics added.) (3 Cal.3d at p. 216.)

In reaching this conclusion, we relied, inter alia, upon the fact that the Unruh Act had emanated from the venerable common law doctrine which "attached [to various 'public' or 'common' callings] 'certain obligations including—at various stages of doctrinal development—*the duty to serve* all customers on reasonable terms without discrimination . . .' " (italics added) (*Id.*, at p. 212), and upon the fact that prior judicial decisions construing the predecessors of the Unruh Act had clearly held that the statutory protections were not limited to discrimination based on race, religion, or national origin but also barred, for example, the exclusion of homosexuals from a public bar or restaurant (Stoumen v. Reilly (1951) 37 Cal.2d 713, 716) or the exclusion of persons with the reputation of immoral character from a public race track. (Orloff v. Los Angeles Turf Club (1951) 36 Cal.2d 734.) Because we could find absolutely no evidence to suggest that the Legislature intended to contract the reach of the statutory protections when it enacted the expansive Unruh Act in 1959, we concluded that the act must properly be interpreted "to interdict all arbitrary discrimination by a business enterprise." (3 Cal.3d at p. 212.)

Although the landlord in this case has not at any time questioned the continued vitality of this court's decision in *Cox*, an argument has been urged that this court's unanimous decision in *Cox* was wrongly decided and should at this late date be overruled. The argument rests upon the assertion that the second sentence of section 51 is inconsistent with the interpretation of the statute in *Cox*. The sentence in question states that "[t]his section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry or national origin."

Although it is asserted that the purport of this language is self-evident, its meaning from a literal standpoint could hardly be

more obscure. Read literally, the sentence appears to provide that the right of equal access to business establishments conferred by section 51 is *not* applicable to persons of every sex, color, race, etc.; that meaning, of course, would completely contradict the fundamental anti-discrimination objective of the statute. Although it is not asserted that we should adopt this interpretation of the sentence, it is suggested that the sentence should be interpreted to exclude from the statute's purview any restriction on access to a business establishment, however arbitrary, that is "applicable alike to persons of every sex, color, race, religion, ancestry or national origin." Thus, under this proposed reading of the statute, for example, the total exclusion of homosexuals or members of the Republican Party from a public restaurant, a shoe store or an apartment complex would be entirely compatible with section 51.

As we pointed out in *Cox*, however, from before the beginning of the twentieth century California's public accommodation statutes have uniformly proscribed the exclusion of individuals on the basis of purely arbitrary classifications. (See Stats. 1897, ch. 108, § § 1, 2, p. 137; Stats. 1905, ch. 413, § § 1, 2, pp. 553-554; Stats. 1919, ch. 210, § § 1, 2, pp. 309-310, Stats. 1923, ch. 235, § § 1, 2, pp. 485.) The argument under discussion proposes that we interpret the confusing, and virtually incoherent, language of the second sentence of section 51 as evidencing a legislative retreat from California's well-established statutory policy prohibiting *all* arbitrary discrimination in places of public accommodation. As we observed in *Cox*, however, " '[w]ithout the most cogent and convincing evidence, a court will never attribute to the Legislature the intent to disregard or overturn a sound rule of public policy.' [Citation.]" (3 Cal.3d at p. 215.)

Moreover, subsequent to our decision in *Cox* the Legislature effectively confirmed our interpretation of the act as barring all forms of arbitrary discrimination. In 1974, the Legislature amended section 51, reenacting the prior provisions of the statute and adding "sex" to the specifically enumerated bases of discrimination listed in the Unruh Act. In sending the bill to the Governor for his signature, the Chairman of the Select Committee on Housing and Urban Affairs explained: "The purpose of the bill is to bring it to the attention of the legal

profession that the Unruh Act provides a remedy for arbitrary discrimination against women (or men) in public accommodations which are business enterprises. This bill does not bring such discrimination under the Unruh Act because that Act has been interpreted as making *all* arbitrary discrimination illegal, on whatever basis. The listing of possible bases of discrimination has no legal effect, but is merely illustrative." (Original emphasis.) The chairman attached to his letter a copy of a legislative counsel opinion, discussing our decision in *Cox* and confirming the chairman's view of the legislation.

It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment. (See, e.g., In re Gladys R. (1970) 1 Cal.3d 855, 868-869; Brailsford v. Blue (1962) 57 Cal.2d 335, 339; Richfield Oil Corp. v. Public Util. Com. (1960) 54 Cal.2d 419, 430; Buckley v. Chadwick (1955) 45 Cal.2d 183, 200; cf. Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 659. See generally 1A Sutherland, Statutory Construction (4th ed.) § 22.33, pp. 191-192.)

In light of the legislative history noted above, this principle of construction particularly applies to the instant case for here we need not simply presume that the Legislature knew of this court's interpretation of section 51 in *Cox* at the time of the 1974 amendment; the legislative documents establish beyond question that the Legislature was well aware of *Cox*'s construction of section 51. Had the Legislature disagreed with the *Cox* interpretation, or had it desired to constrict the reach of section 51 in a manner incompatible with *Cox*, it presumably would have altered the preexisting language of the statute so to indicate. (See, e.g., Estate of McDill (1975) 14 Cal.3d 831, 840.) Instead, the Legislature reenacted the previously-construed language verbatim, simply adding an explicit reference to sex discrimination to highlight the statute's application in that area. Under the numerous authorities cited above, this

action represents a legislative endorsement of *Cox*'s interpretation of section 51.[7]

Indeed, in recent years, a spate of decisions by the appellate courts and the opinions of the Attorney General have explicitly concluded, in a variety of contexts, that the Unruh Act covers a wide range of discriminatory practices. Thus, for example, the

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[7]In arguing that the Unruh Act does not apply to discrimination by the landlords against families with children, Marina Point relies on the fact that in recent years a number of bills addressed to the issue of housing discrimination against children have been introduced in the Legislature but have not been enacted. (See Sen. Bill No. 359 (1977-1978 Reg. Sess.); Sen. Bill No. 440 (1979-1980 Reg. Sess).) California courts have frequently noted, however, the very limited guidance that can generally be drawn from the fact that the Legislature has not enacted a particular proposed amendment to an existing statutory scheme. (See, e.g., Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 480, fn. 13.) As the Court of Appeal explained in Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 58: "The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. A third group of legislators might oppose them to preserve an existing prohibition, and a fourth because there was no need to clarify an existing permission. The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidence of legislative intent they have little value. [Citations.]"

In view of the legislative history of the 1974 amendment discussed above, the observations of the *Sacramento Newspaper Guild* court appear particularly apt. As we have seen, in 1974 the Legislature noted that section 51 applied to all arbitrary discrimination and that "[t]he listing of possible bases of discrimination has no legal effect, but is merely illustrative." Thus, the nonenactment of the bills in question might well reflect a determination that there is no need to clarify the existing prohibition. Moreover, each of the bills in question contained a variety of provisions which would have excepted certain designated housing facilities from the bill's ban on discrimination against families with children; thus, nonpassage might also be attributable to disagreement with the scope of such exceptions, rather than with the general prohibition on discrimination against children.

In addition, we note that although the Legislature has recently enacted specific provisions authorizing "adult only" restrictions in mobile home parks (see Civ. Code, §§ 798.76, 799.5, enacted Stats. 1978, ch. 1031, § 1, pp. 3183, 3185 (discussed at p. _____, fn. 11, *post*),* the Legislature has not adopted any comparable provision sanctioning such restrictions in apartment complexes or in rental housing generally.

*Typed opinion, pages 3-7, footnote 11.

decisions and opinions have established the act's application to exclusionary policies directed against (1) students (59 Ops. Cal.Atty.Gen. 70 (1976)), (2) welfare recipients (59 Ops. Cal.Atty.Gen. 223 (1976)), (3) those of a particular occupation or marital status (58 Ops. Cal.Atty.Gen. 708, 613 (1975)), or (4) those who associate with blacks. (Winchell v. English (1976) 62 Cal.App.3d 125, 128-130.) Unlike the municipal court decision at issue here, these numerous decisions properly recognize that the protection against discrimination afforded by the Unruh Act applies to "all persons," and is not reserved for restricted categories of prohibited discrimination. Accordingly, the municipal court's decision in this case unquestionably proceeded from a fundamental misinterpretation of the Unruh Act.

3. The Landlord's Blanket Exclusion Of All Families With Minor Children Is Not Permissible Under The Unruh Act Even If Children "As A Class" are "Noisier, Rowdier, More Mischievous And More Boisterous" Than Adults.

The landlord maintains, however, that even if the municipal court erred in concluding that the Unruh Act did not apply because children or families with children were not a "protected class" under the act, the judgment in its favor should nonetheless be affirmed. It asserts that the trial court's findings of fact demonstrate that its policy of excluding all families with children from its apartment complex is "reasonable" and not "arbitrary" and, as such, is not barred by the Unruh Act.

In this regard, the landlord correctly points out that in *Cox* we explained that while the Unruh Act prohibits a business establishment from engaging in any form of arbitrary discrimination, the act does not absolutely preclude such an establishment from excluding a patron in all circumstances. As we stated in *Cox*: "In holding that the Civil Rights Act forbids a business establishment generally open to the public from arbitrarily excluding a prospective customer, we do not imply that the establishment may never insist that a patron leave the premises. Clearly, an entrepreneur need not tolerate customers who damage property, injure others or otherwise disrupt his business. A business establishment may, of course, promulgate

reasonable deportment regulations that are rationally related to the services performed and the facilities provided. [Citation.]" (3 Cal.3d at p. 217.)

The landlord contends that the exclusionary policy at issue here falls within the category of permissible regulations to which *Cox* adverted. Marina Point acknowledges that its blanket policy of excluding all families with children cannot properly be characterized as a "deportment regulation" since it does not focus on the conduct of the individuals or families who are actually excluded by the rule. (Cf. Hales v. Ojai Valley Inn and Country Club (1977) 73 Cal.App.3d 25, 28-29 (restaurant rule requiring men to wear ties).) The landlord contends, however, that in light of the trial court's factual finding that "[c]hildren are rowdier, noisier, more mischievous and more boisterous than adults," its exclusion of all children bears a rational relation to its legitimate interest in preserving an appropriate environment.

In support of its contention, the landlord relies heavily upon the case of Flowers v. John Burnham & Co. (1971) 21 Cal.App.3d 700. In *Flowers*, the plaintiff tenants, who had been evicted from their apartment, alleged that their landlord had violated the Unruh Act by adopting a policy of excluding all families with male children over the age of five. The trial court sustained the landlord's demurrer to the complaint and, on appeal, the Court of Appeal, in a very brief, two-and-one-half page opinion, affirmed the trial court judgment. Although recognizing that under *Cox* the Unruh Act barred all arbitrary discrimination by such a landlord, the court upheld the landlord's policy of excluding families on the basis of their children's sex and age. Disposing of the tenant's contention in two, rather conclusory sentences, the court stated: "Because the independence, mischievousness, boisterousness and rowdyism of children vary by age and sex, Burnham, as landlord, seeks to limit the children in its apartments to girls of all ages and boys under 5. Regulating tenants' ages and sex to that extent is not unreasonable or arbitrary." (21 Cal.App.3d at p. 703.)[8]

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[8]In Ritchey v. Villa Nueva Condominium Assn. (1978) 81 Cal.App.3d 688, the Court of Appeal cited this passage from *Flowers* in rejecting a

(footnote continued on following page)

Although the *Flowers* court's reasoning, such as it is, does support the present landlord's position, we believe that both the landlord's contention and the *Flowers* decision rest on a fundamental misconception of the *Cox* decision and, more basically, of the *individual* nature of the statutory right afforded "all persons" by section 51. As already noted, in *Cox* we explained that the provisions of section 51 derive from the common law doctrine which imposed upon certain enterprises affected with a public interest " 'the duty to serve *all* customers on reasonable terms without discrimination.' " (Italics added.) (3 Cal.3d at p. 212.) Under this common law principle, each member of the public, as an individual, possessed the right to obtain the services of such enterprises. (See, e.g., Willis v. McMahan (1891) 89 Cal. 156, 157-158; see generally Beale on Innkeepers and Hotels (1906) pp. 42-50, 63-69.)

The rights afforded by the Unruh Act similarly are enjoyed by all persons, as individuals. As an early decision construing a predecessor of section 51 declared: "The purpose [of the statutes] is to compel a recognition of the equality of citizens in the right to the peculiar service offered by [the] agencies [covered by the acts]." (Piluso v. Spencer (1918) 36 Cal.App. 416, 419. See also Greenberg v. Western Turf Assn. (1903) 140 Cal. 357, 362 ("The defendant is conducting a place of amusement. There is held out to the public under the guaranty of the statute the right to admission to this place of amusement and to the enjoyment of the pleasure which it affords. This is the right which the plaintiff had secured to him by the law, in common with all other inhabitants of the state. . . ."); Perrine v. Paulos (1950) 100 Cal.App.2d 655, 657.)

As we recognized in *Cox*, of course, an individual may forfeit his statutory right of access to the services of a business enterprise if he conducts himself improperly or disrupts the operations of the enterprise. But, contrary to the contention of Marina Point and the suggestion of the *Flowers* case, the Unruh

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condominium owner's challenge to the validity of an association's by-law which limited the occupancy of a portion of a condominium project to persons 18 years of age or older. In *Ritchey*, however, the plaintiff did not raise any claim under the Unruh Act at all, and consequently the Court of Appeal in that case did not address the question presented in the instant proceeding.

Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class "as a whole" is more likely to commit misconduct than some other class of the public.

This proposition is clearly demonstrated by our prior decisions in *Orloff v. Los Angeles Turf Club, supra,* and *Stoumen v. Reilly, supra.* Undoubtedly the class of persons with "reputations as to immoral character" was more likely than the general population to engage in illegal activities which a public race track legitimately would seek to prevent. *Orloff* clearly held, however, that an individual could not be excluded from the race track on the basis of such classification, but rather had a right to be judged on the basis of his own conduct. Similarly, although it may have been thought true—at least under the mores of that time—that homosexuals as a class were more likely than heterosexuals to engage in the kind of "immoral conduct" that would justify expulsion from a public restaurant or bar (see, e.g., Vallerga v. Dept. Alcoholic Bev. Control (1959) 53 Cal.2d 313, 319-320), in *Stoumen* we held that any such class generalization did not afford a proper basis for exclusion of all homosexuals; instead, we emphasized that "[m]embers of the public . . . have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immorals acts. . . ." (37 Cal.2d 713, 716.)

Indeed, the basic rights guaranteed by section 51 would be drastically undermined if, as the landlord contends, a business enterprise could exclude from its premises or services entire classes of the public simply because the owner of the enterprise had some reason to believe that the class, taken as a whole, might present greater problems than other groups. Under such an approach, for example, members of entire occupations or avocations, e.g., sailors or motorcyclists, might find themselves excluded as a class from some places of public accommodation simply because the proprietors could show that, as a statistical matter, members of their occupation or avocation were more likely than others to be involved in a disturbance. (See, e.g., Atwater v. Sawyer (1884) 76 Me. 539 [49 Am. Rep. 634] (innkeeper's exclusion of all members of the militia, because of disorderly conduct of other militiamen, held impermissible).) Similarly, members of a particular nationality or ethnic group

might be excluded from an apartment complex simply because the landlord had found from his experience that members of that nationality or ethnic group were more likely to play loud music or to damage the landlord's property than tenants of other backgrounds.

As these examples demonstrate, the exclusion of individuals from places of public accommodation or other business enterprises covered by the Unruh Act on the basis of class or group affiliation basically conflicts with the individual nature of the right afforded by the act of access to such enterprises. As the United States Supreme Court observed in reaching a similar conclusion with respect to the antidiscrimination provisions of Title VII of the federal Civil Rights Act of 1964 in Los Angeles Dept. of Water & Power v. Manhart (1978) 435 U.S. 702, 708: "The statute's focus on the individual . . . precludes treatment of individuals as simply components of a racial, religious, sexual or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. *Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.*" (Italics added.)

As *Cox* makes clear, of course, under the Unruh Act exclusion on the basis of a group classification is as improper when applied to "children" or "families with children" as it is when applied to occupational, racial, religious or other broad "status" classifications. Indeed, if we were to accept the landlord's contention that a blanket exclusion of children or families with children from rental housing can be justified because children as a class are noisier, rowdier and more boisterous than adults, it would logically follow that children could uniformly be excluded from virtually all business enterprises or places of public accommodation since, like apartment complexes, most businesses can claim a legitimate interest in eliminating excessively noisy, rowdy or boisterous conduct.

As our decisions in *Cox*, *Orloff* and *Stoumen* teach, although entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior, under the Unruh Act entrepreneurs must generally exercise this legitimate interest directly by excluding those persons who are

in fact disruptive. Entrepreneurs cannot pursue a broad status-based exclusionary policy that operates to deprive innocent individuals of the services of the business enterprise to which section 51 grants "all persons" access.[9]

4. Neither The Nature Of The Business Enterprise Nor The Nature Of The Facilities Justifies The Blanket Exclusion Of All Families With Children From The Marina Point Apartment Complex.

Finally, the landlord argues that even if the potential misbehavior of children as a class does not justify its exclusionary practice under the Unruh Act, its "no children" policy may nonetheless be sustained as reasonable on the ground that the presence of children basically does not accord with the nature of its business enterprise and of the facilities provided. In this regard, the landlord attempts to analogize its contemplated "adults only" apartment appurtances and exceptional arrangements for their specified purposes. The special housing needs of the elderly in contemporary American society have been extensively chronicled,[10] and both the state and federal govern-

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[9]Although the case of Newby v. Alto Riviera Apartments (1976) 60 Cal.App.3d 288 involved a landlord's threatened eviction of a tenent on the basis of the tenant's own conduct and thus is clearly distinguishable from the instant matter, some language in the *Newby* opinion does conflict with the above analysis of the Unruh Act and must be disapproved. In *Newby*, the court stated: "Action by a landlord which does not restrict the right of a tenant to insure habitable living premises, and does not discriminate on the basis of race, sex, color, religion, ancestry, or national origin, is not actionable under the [Unruh Act] if it proceeds from a motive of rational self-interest, i.e., if it is 'rationally related to the facilities provided.' " (*Id.*, at p. 302.)

This statement is surely overbroad since an entrepreneur may pursue many discriminatory practices "from a motive of rational self-interest," e.g., economic gain, which would unquestionably violate the Unruh Act. For example, an entrepreneur may find it economically advantageous to exclude all homosexuals, or alternatively all nonhomosexuals, from his restaurant or hotel, but such a "rational" economic motive would not, of course, validate the practice. (See Stoument v. Reilly, *supra*, 37 Cal.2d 713.)

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[10]See, for example, 2 White House Conference on Aging, Toward a National Policy on Aging (1971) 29-36; President's Task Force on Aging,

(*footnote continued on following page*)

ments have enacted specific "age-conscious" legislative measures addressed to this problem. (See, e.g., Health & Saf. Code, § 51230 (reserving proportion of state-financed low income housing for occupancy by elderly); 12 U.S.C. § 1701q (federal loan program for housing for elderly families); 42 U.S.C. § 1485 (same).)

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Toward a Brighter Future for the Elderly (1970) 38-40; Hearings on Condominium Conversions and the Elderly before the California Assembly Committee on Aging (1978).

In Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp. (1976) 71 N.J. 249 [364 A.2d 1016, 1026-1028], the New Jersey Supreme Court, in a thoughtful and well-documented opinion, explained at some length the numerous factors underlying the special housing needs of the elderly. The Court stated: "In part the need of the elderly for specialized housing results from the fixed and limited incomes upon which many older persons are dependent. . . . [¶] In part, though, the needs for specialized housing transcends economic status and results from the particular physical and social problems of the elderly. . . .'. . . To the elderly, accidents in the home are a real danger. Falls, for example, are the leading cause of accidental death for those 65 and over. . . . [Housing p]lans should include more and wider walkways with fewer stairs, an interior and exterior designed to permit easy social contact, provision for common rooms, short distances between buildings, easy refuse collection, light maintenance and well-lighted walkways and halls. . . .'

"Though special social and psychological needs of the elderly are perhaps less obvious than their physical needs, they are no less real. The elderly are apt to be less mobile than younger persons. They may have lost friends and relatives of comparable age and background. As a result, readily accessible companionship becomes increasingly important to them. In addition, the fact that children may have moved away sometimes causes elderly persons to seek an age-homogeneous environment to replace broken family ties. . . . Such an environment also helps older citizens to adjust to the social and psychological effects of retirement. . . . In addition, age-homogeneous communities afford a sense of security to their residents and thereby reduce the fear of criminal victimization. . . . Finally, these communities facilitate social relations and increase opportunities for the peer contact which many older persons need and desire." (364 A.2d at pp. 1026-1028 [citations omitted].) (See also Teaff et al., *Impact of Age Integration on the Well-Being of Elderly Tenants in Public Housing* (1978) 33 J. Gerontology 126 (empirical study finding that elderly tenants "living in age-segregated environments . . . participate more in organized activities within the housing environment,. . . have higher morale, higher housing satisfaction, and greater mobility in their neighborhoods").)

In light of the public policy reflected by these legislative enactments, age qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment. (See, e.g., Taxpayers Ass'n. of Weymouth Tp. v. Weymouth Tp., *supra*, 71 N.J. 249 [346 A.2d 1016, 1026-1030]; 58 Ops.Cal.Atty.Gen. 608, 613 (1975).)[11] Such a specialized institution designed to meet a social need differs fundamentally from the wholesale exclusion of children from an apartment complex otherwise open to the general public.[12]

Marina Point cannot plausibly claim that its exclusionary policy serves any similarly compelling societal interest. It can hardly contend, for example, that the class of persons for whom Marina Point seeks to reserve its housing accommodation, i.e., single adults or families without children, are more in need of housing than the class of persons whom the landlord has excluded from its apartment complex; indeed, precisely the

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[11]In light of the housing special needs of older citizens, the New Jersey Supreme Court, in the *Weymouth* case quoted at length in footnote 10, upheld the validity of a municipal zoning ordinance setting aside a portion of land for use as a mobile home park for older citizens. In reaching its conclusion, the court observed: "The role which mobile home developments can play in satisfying the special needs of the State's senior citizens is evident. First, mobile homes provide a relatively inexpensive form of housing at a time when the demand for such housing and its availability is limited . . . Second, mobile home developments afford the elderly the age-homogeneous environments which many older persons now seek and desire. Finally, the size of mobile homes is ideal for older persons with both physical and financial limitations. . . ." (364 A.2d at p. 1029.)

These special features of mobile home parks, which corrolate closely with the special needs of older citizens, may well explain the fact that mobile home parks constitute the only housing facilities in which the California Legislature has explicitly authorized "adult only" restrictions. (See Civ. Code, §§ 798.76, 799.5.)

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[12]Thus, contrary to the suggestion of the dissent (dis. opn., *post*, p. _____*), this opinion does not bar age-limited admission policies of retirement communities or housing complexes reserved for older citizens.

*Dis. opn., pp. 1-2.

opposite is true. As the Legislature stated in 1979: "The Legislature finds and declares that the state's housing problems are substantial, complex and now of crisis proportion. . . . The Legislature finds and declares that the greatest need for housing is experienced by residents at the lower end of the economic scale. Many moderate and low income households *with children* cannot normally find decent, safe and suitable housing at prices they can afford. . . ." (Italics added.) (Stats. 1979, ch. 1043, § § 1, 2, pp. _____.) Thus, unlike the case of special housing for the elderly, the exclusionary policy at issue here exacerbates, rather than alleviates, the state's specialized housing needs.

Finally, apartment house living is by no stretch of the imagination the type of dangerous or hazardous activity as to which the exclusion of children might be defended on health or safety grounds. Although certain facilities offered by an apartment complex may possibly be withheld from children pursuant to such a safety rationale, a landlord cannot seize upon the availability of such incidental facilities as a justification for closing off all of its principal services, i.e., housing accommodations, to the broad class of families with children.[13] If the

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[13]Although one argument urged in defense of the exclusion of families with children from Marina Point rests upon the presence of swimming pools on the premises, the landlord's own actions reveals the hollowness of the contention. The swimming pools were part of the apartment complex long before the landlord instituted its "adults only" program. If the pools were not incompatible with the presence of children during the period before the new program, the pools could hardly become prohibitively dangerous after the institution of that program.

Moreover, the landlord's ostensible concern for the safety of children has never led it to adopt the less restrictive practice of simply excluding children from the use of the pools. Instead, the evidence at trial established that the landlord has routinely permitted both the remaining resident children and children of guests to use its swimming facilities. Under these circumstances, the presence of the swimming pools cannot possibly justify the landlord's broad exclusionary policy.

Finally, we note that the asserted "special features" on which the dissent relies—swimming pools with no shallow ends, no playgrounds, ungated gangplanks to the ocean—are hardly the kind of amenities which would suggest that this apartment complex was intended solely for "our middle aged or older citizens" on whose behalf the dissent defends the complex's exclusionary policy. (See dis. opn. *post*, pp. _____.)*

*Dis. opn., pp. 1-2.

rule were otherwise, of course, a proprietor could easily circumvent the Unruh Act's prohibitions simply by adding some incidental facility which posed a special danger to an undesired class of potential patrons. The fundamental right of equal access to public business enterprises established by the Unruh Act cannot be so readily defeated.

5. Conclusion.

A society that sanctions wholesale discrimination against its children in obtaining housing engages in suspect activity. Even the most primitive society fosters the protection of its young; such a society would hardly discriminate against children in their need for shelter. Yet here the landlord would single out children as a class for exclusion from shelter although such discrimination against racial minorities or religious groups would be unquestionably illegal. Indeed, under the Unruh Act we have condemned *any* arbitrary discrimination against any class.

The argument is launched that children clearly may be excluded from certain kinds of housing, such as housing for the aged, housing for special classes or purposes, and therefore that the instant exclusion is justified. But we do not here adjudge such special purpose housing. We have before us a mammoth apartment complex consisting of 846 separate apartments which proposes to engage in wholesale discrimination against children. To permit such discrimination is to approve of widespread, and potentially universal, exclusion of children from housing. Neither statute nor interpretation of statute, however, sanctions the sacrifice of the well-being of children on the altar of a landlord's profit, or possibly some tenants' convenience.

The judgment is reversed.

*TOBRINER, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
BROUSSARD, J.
+WHITE, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

+Assigned by the Chairperson of the Judicial Council.

COPY

MARINA POINT, LTD. v. WOLFSON et al.
L.A. 31199

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent.

This case illustrates a truism: the answer to a legal question frequently depends upon how the question is phrased. If the issue before us is, as framed by the majority (*ante*, p. _____ [maj. opn., at p. 40]) should we approve "wholesale discrimination against children," or the "universal exclusion of children from housing" or sanction "the sacrifice of the well-being of children on the altar of a landlord's profit, or possibly some tenants' convenience," the answer is a thundering "no." We'll choose children over a landlord's profit and greed every time. If, however, the question is put a little differently, and we inquire—do our middle aged or older citizens, having worked long and hard, having raised their own children,having paid both their taxes and their dues to society retain a right to spend their remaining years in a relatively quiet, peaceful and tranquil environment of their own choice? The answer to such a question is, why not? There are two conflicting social policies present in this case, and a just society including its law courts should try to accommodate and serve them both.

The majority does not identify any constitutional violations here. Rather it bases its sweeping holding exclusively on the Unruh Civil Rights Act (Civ. Code, § 51). Section 51 provides as follows: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. [¶] This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin."

We closely examined this section in In re Cox (1970) 3 Cal.3d 205, and held that its enumeration of prohibited forms of

discrimination was "illustrative, rather than restrictive" (p. 212) and not only incorporated those rights which were declared by this court to exist under former civil rights legislation dealing with places of "public accommodation and amusement" (see Stoumen v. Reilly (1951) 37 Cal.2d 713; Orloff v. Los Angeles Turf Club (1951) 36 Cal.2d 734) but also extended those rights, in the words of the statute, to "all business establishments of every kind whatsoever." Thus, we concluded, the Unruh Act does more than prohibit the enumerated forms of discrimination in all business establishments. "[B]oth its history and its language disclose a clear and large design to interdict *all arbitrary discrimination* by a business enterprise." (3 Cal.3d, at p. 212, italics added.) Having so held, we were very careful to explain that this ban, however comprehensive in scope, was not absolute in application. There was no violation of the Unruh Act, we noted, by the establishment and enforcement of "*reasonable regulations that are rationally related to the services performed and facilities provided.*" (*Ibid*, italics added.)

It seems clear to me that Marina Point (1) is a "business establishment" within the meaning of, and therefore subject to, the Unruh Act (Flowers v. John Burnham & Co. (1971) 21 Cal.App.3d 700, 703; Swann v. Burkett (1962) 209 Cal.App.2d 685, 694-695; cf. Abstract Investment Co. v. Hutchinson (1962) 204 Cal.App.2d 242, 254-255; see also 56 Ops.Cal. Atty.Gen. 546 (1974)), and (2) has not violated the Unruh Act if its rental policy was a "reasonable regulation[ ]. . .rationally related to the services performed and facilities provided." (*Cox, supra,* at p. 212.) Under the circumstances of this case, the trial court concluded that plaintiff's policy was reasonable. I agree with its conclusion.

The trial court made express findings of fact that the facilities at Marina Point are "designed for use by adults, not children, and pose dangers to children who are not accompanied by adults." It further expressly found that plaintiff Marina Point's "exclusion of children from the premises at issue herein is rationally related to the lack of facilities provided for children . . . ." These findings were amply supported by the record. The evidence before the trial court established, in substance, that Marina Point was designed and constructed for the purpose

of providing all-adult rental housing, and that as such its facilities were ill-adapted for use by children. There was unchallenged testimony that, among other things, neither of the two swimming pools of the facility has a shallow end; there are no playgrounds or any other facilities appropriate for recreational use by children; gang-planks leading from the facility directly to the adjoining ocean are not equipped with gates; and, in general, the use of existing facilities at Marina Point by children when playing results in substantial danger both to themselves and to adult tenants alike.

The majority attempts to discount the force of these findings by observing that Marina Point, prior to the 1974 decision to accept no further tenants with children, freely rented to families having children. It is suggested, in short, that the adaptability of the premises to use by children is demonstrated by the fact that they have actually resided there. This proposition, its logical failings aside, must be considered in the light and context of the record which reflects that plaintiff became the owner of the complex in 1972, several years after it was built; that at that time, as a result of existing leases, there were children included among the tenants; and that in 1974, two years after acquiring the property and because of its experience during that period, plaintiff decided that no further leases to families with children would be entered into, but that families with children then in occupancy should be allowed to remain.

I do not agree with the majority's suggestion that one who purchases property which is constructed and designed for all-adult rental occupancy is thereafter for all time precluded under the Unruh Act from putting that property to its intended use because a prior owner had chosen to do otherwise. Here, plaintiff purchased property which was subject to outstanding leases and a then current rental policy which had previously permitted occupancy inconsistent with the design for the complex.

Our sole inquiry, under *Cox*, is to determine whether the landlord has acted reasonably—i.e., whether in initiating and enforcing its new policy, it has done so by regulations which are reasonable in light of the circumstances and "rationally related to the services performed and facilities provided." (*Cox, supra*, at p. 212.) The trial court's conclusion that plaintiff's action

met this standard is fully supported by the court's express findings of fact and substantial evidence in this record. (See Stevens v. Parke, Davis & Co. (1973) 9 Cal.3d 51, 63-64.) It has long been our rule that our review "begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." (Primm v. Primm (1956) 46 Cal.2d 690, 693.)

Because the majority declines to reach defendants' constitutional arguments, I, accordingly, do not discuss them here other than to observe that the equal protection and due process principles relied upon by defendants place no restrictions upon purely *private* action, but affect only *state* action, which is not involved here. (Garfinkle v. Superior Court (1978) 21 Cal.3d 268, 281-282; Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352, 366-367; Shelley v. Kraemer (1948) 334 U.S. 1, 13; Civil Rights Cases (1883) 109 U.S. 3, 11-19; see also Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal.3d 458, 468, 493.)

I fully share the majority's concern with the current need in this state for moderate and low income housing for families with children. We should impose no restriction on the power of either state or local government, through the proper exercise of their police powers, to enact measures calculated to insure that all families with children are able to secure adequate and affordable housing. In the matter before us, however, the majority simply disagrees with the explicit fact findings of a trial court which listened to the witnesses, examined the evidence, and expressly found as a fact that the premises in question were planned and built for all-adult tenants and not for children. On the basis of these findings, there is nothing in the Unruh Act which prohibits limitations here imposed. It is not unreasonable that the rental policies of an apartment complex be tailored and fashioned to match its planned design and character. If the trial court had found as a fact that the premises were designed for *general* use a different legal conclusion would follow.

I would dismiss the appeal of plaintiff Marina Point from the order after judgment taxing costs, and would affirm the judgment.

RICHARDSON, J.

I CONCUR:

MOSK, J.

MARINA POINT, LTD. v. WOLFSON et al.
L.A. 31199

COUNSEL FOR THE PARTIES:

For Respondent:

Richard F. Hamlin
4519 Admiralty Way #202
Marina del Rey, California 90291
(213) 822-2676

For Appellants:

Gratz and Wolfson
1901 Avenue of the Stars #1232
Los Angeles, California 90067
(213) 879-1232
(213) 277-1232

TRIAL COURT: Municipal Court, Culver City Judicial District, Los Angeles County

TRIAL COURT: Municipal Court No. A-15829; Appellate Department No. A-14120

NAME OF JUDGE: Honorable Harold I. Cherness

IN THE

Supreme Court of the State of California

L.A. No. 31199

MARINA POINT, LTD.,
Plaintiff and Respondent,
vs.
STEPHEN WOLFSON et al.,
Defendants and Appellants.

Appeal
County Los Angeles
MUNICIPAL COURT No. A 15829

The above-entitled cause having been heretofore fully argued, and submitted,

It Is Ordered, Adjudged, and Decreed *by the Court that the* JUDGMENT

of the MUNICIPAL *Court* OF THE CULVER JUD. DIST. *County of* LOS ANGELES *in the above-entitled cause,* IS *hereby* REVERSED.
APPELLANTS SHALL RECOVER COSTS ON APPEAL.

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the* 8th *day of* FEBRUARY, *1982.*

WITNESS *my hand and the seal of the Court, this* 9th *day of* APRIL, *1982.*

LAURENCE P. GILL
Clerk

By _____
Deputy

APR 1 2 1982

CLERK'S OFFICE, SUPREME COU(
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

APR 8 1982

I have this day filed Order denied

REHEARING DENIED

In re: L.A. *No.* 31199

MARINA POINT, LTD.

vs.

WOLFSON

Respectfully,

Clerk

22647-877 8-81 49 CAM(U)• OTP

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APPENDIX D

RECEIVED
CULVER MUNICIPAL COURT

IN THE MUNICIPAL COURT OF THE CULVER JUDICIAL DISTRICT COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

MARINA POINT, LTD., *Plaintiff,* -vs- STEPHEN WOLFSON, et al., *Defendants.*	NO. A 15829 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial on September 15, 1977 in Division II of the above-entitled Court, the Honorable Harold I. Cherness, Judge, Presiding, without a jury and was actually tried on that date and on September 16, 1977, September 20, 1977, September 23, 1977, September 28, 1977, September 30, 1977, October 4, 1977, October 6, 1977, October 7, 1977, October 11, 1977, October 12, 1977 and October 21, 1977. The defendants Stephen Wolfson and Lois Wolfson and each of them appeared and were present at all proceedings and were represented at all proceedings by their attorneys, Gillin, Gottesman & Menes, by Eugene Gratz and the plaintiff Marina Point, Ltd. was present at all appearances and represented by its attorneys of record Peterson & Hamlin by Richard F. Hamlin. Evidence, both oral and documentary, was introduced on behalf of all parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel, and being fully advised, makes the following findings of fact and conclusions of law:

PROPOSED FINDINGS OF FACT

1. On or about January 17, 1977 plaintiff Marina Point, Ltd. leased to defendants Stephen Wolfson and Lois Wolfson and each of them certain premises known as 14000 Tahiti Way, #313, Marina del Rey, California under a written lease for a month-to-month tenancy at a monthly rental of $390.00, payable in advance on the first day of each and every month commencing February 1, 1977 and ending no later than April 30, 1977. The lease was admitted into evidence as Exhibit 1.

2. By exchange of letters dated April 11, 1977 and April 18, 1977, the term of the lease was extended until May 31, 1977. Said letters were admitted into evidence as Exhibits 2 and 3.

3. Pursuant to said lease, the defendants Stephen Wolfson and Lois Wolfson and each of them went into possession of the premises and continue to occupy the same.

4. By the terms of the lease which was Exhibit 1 as extended by Exhibits 2 and 3, the defendants Stephen Wolfson and Lois Wolfson and each of them convenanted to vacate the premises not later than May 31, 1977.

5. The defendants Stephen Wolfson and Lois Wolfson and each of them refused to surrender possession of the premises on May 31, 1977, or at any time thereafter, and continue to refuse to surrender possession of the premises and continue to deprive plaintiff Marina Point, Ltd. of possession of the premises.

6. Defendants Stephen Wolfson and Lois Wolfson and each of them continue in possession of said premises without the consent or permission of the plaintiff Marina Point, Ltd.

7. The reasonable rental value of said premises is $13.50 per day for each day that defendants remain in possession of the premises beyond the date of termination of said lease; said $13.50 per day is a reasonable rental value for the premises together with an amount reasonable to compensate the plaintiff Marina Point, Ltd. for damages suffered by the continued holding over by the defendants Stephen Wolfson and Lois on.

8. The continuance by defendants of possession is willful.

9. The plaintiff Marina Point, Ltd. has retained the law firm of Peterson and Hamlin and Richard F. Hamlin to represent them in this matter and has incurred a reasonable attorneys fee.

(AFFIRMATIVE DEFENSES)

10. The plaintiff Marina Point, Ltd. leases from the County of Los Angeles the land upon which the premises are constructed.

11. The land upon which the premises are constructed was originally acquired by the County of Los Angeles in whole or in part through the use of the eminent domain power for the purpose of building a small boat harbor, and not for the purpose of constructing housing.

12. The primary purpose of the County of Los Angeles in its activities at Marina del Rey is the construction and maintenance of a small craft harbor.

13. The rental of parcels of land and water to lessees, including the plaintiff Marina Point, Ltd., is ancillary to the county's primary purpose.

14. The premises at issue herein were constructed and are operated and maintained by the plaintiff Marina Point, Ltd. without any manner of assistance or subsidy from any level of government.

15. The operation of the premises at issue herein by the plaintiff Marina Point, Ltd. does not constitute operation of the premises by any state or local or federal entity and no state action is involved in the construction, maintenance or operation of the premises at issue herein or in the rental practices engaged in by the plaintiff Marina Point, Ltd.

16. The exclusion of the defendants Stephen Wolfson and Lois Wolfson from the premises at issue herein, does not constitute an exclusion from Marina del Rey, the public beach, public library, walkways, roads, businesses, services or other public facilities which are located at Marina del Rey.

17. The tenancy of the defendants Stephen Wolfson and Lois Wolfson and each of them terminated on May 31, 1977 by expiration of their lease. The refusal of plaintiff Marina Point, Ltd. to renew the lease is neither arbitrary nor capricious nor in violation of any of defendants' rights to due process of law or the equal protection of the laws guaranteed by the Constitutions of the State of California and the United States.

18. Plaintiff Marina Point, Ltd. did not file this unlawful detainer proceeding in retaliation for the commencement by the defendants Stephen Wolfson and Lois Wolfson of a Superior Court action against the plaintiff Marina Point, Ltd.

19. The filing of this unlawful detainer proceeding by the plaintiff Marina Point, Ltd. is not in retaliation for the exercise by the defendants Stephen Wolfson or Lois Wolfson or either of them of any of their rights under Statutes and Constitutions of the State of California and of the United States.

20. On September 25, 1975, a child was born to the

defendants Stephen Wolfson and Lois Wolfson and has resided with them in the premises at issue herein ever since.

21. Marina Point, Ltd. has refused to renew the lease of the defendants Stephen Wolfson and Lois Wolfson because they wish to reside in the premises at issue herein with their child. Marina Point, Ltd. has brought this action that the lease of the defendants Stephen Wolfson and Lois Wolfson for the premises at issue herein has expired and the defendants and each of them refused to surrender possession of those premises.

22. Where one has a child, it is more difficult to obtain housing than it is where one does not have a child.

23. The defendants Stephen Wolfson and Lois Wolfson found at least two apartments which would rent to them and permit them to reside at those apartments with their child. The defendants Wolfson considered one of those apartments to be too expensive and the other to have too many children.

24. There are apartments available which rent to families with children, including Stephen & Lois Wolfson.

25. The premises at issue herein are not generally open to the public.

26. When children live at an apartment complex, they cause more damage to apartments and landscaping than adults and children are noisier and more disruptive to other tenants than adults and children cause higher maintenance costs than adults.

27. Children are rowdier, noisier, more mischievous and more boisterous than adults.

28. The facilities at Marina Point, Ltd. are designed for use by adults, not children, and pose dangers to children who are not accompanied by adults.

29. The plaintiff Marina Point, Ltd.'s exclusion of children from the premises at issue herein is rationally related to the lack of facilities provided for children, to the noise and damage caused by children and proceeds from a reasonable economic motive to promote a quiet and peaceful environment free from noise and damage caused by children.

30. The premises at issue herein are not "publicly assisted housing accommodations" in that:

(a) They are not exempt from taxes in whole or in part;

(b) They are not constructed on land sold below cost by the state or any of its political subdivisions per the Federal Housing Act of 1949;

(c) They are not constructed on property acquired by the state or any of its political subdivisions for the purpose of construction under the Federal Housing Act of 1949;

(d) Their construction or acquisition was not financed in whole or in part with a loan, the repayment of which is guaranteed or insured by the Federal Government.

31. The premises at issue herein are located in a building which contains more than four dwelling units.

32. The lease between the plaintiff Marina Point, Ltd. and the County of Los Angeles contains no prohibition against excluding families with children from the premises at issue herein.

33. The lease between the plaintiff Marina Point, Ltd. and the County of Los Angeles is not made expressly for the benefit of any persons other than the County of Los Angeles and the plaintiff Marina Point, Ltd. and is not made expressly for the benefit of the defendants Stephen Wolfson and Lois Wolfson or either of them.

CONCLUSIONS OF LAW

34. The defendants Stephen Wolfson and Lois Wolfson and each of them are unlawfully detaining the premises which are commonly known as 14000 Tahiti Way, #313, Marina del Rey, California 90291.

35. The instrument under which the plaintiff Marina Point, Ltd. holds possession of the land upon which the premises at issue herein have been built is a lease and not a license.

36. The refusal of plaintiff Marina Point, Ltd. to rent to the defendants Stephen Wolfson and Lois Wolfson violates neither the Due Process Clause nor the Equal Protection Clause of the Constitution of the United States nor the similar clauses of the Constitution of the State of California.

37. This Court has jurisdiction over the subject matter of this action.

38. The refusal of plaintiff Marina Point, Ltd. to rent to defendants Stephen Wolfson and Lois Wolfson does not violate the Unruh Act (*Civil Code* § §51 and 52).

39. The refusal of plaintiff Marina Point, Ltd. to rent to the defendants Stephen Wolfson and Lois Wolfson does not violate the Rumford Fair Housing Act (Health and Safety Code § §35700 - 35745).

40. The refusal of plaintiff Marina Point, Ltd. to rent to the defendants Stephen Wolfson and Lois Wolfson does not violate the various legislative enactments which have created, enabled and funded Marina del Rey or the "public use" or the "public purpose" provisions of those enactments.

41. Plaintiff Marina Point, Ltd. is entitled to recover from the defendants Stephen Wolfson and Lois Wolfson and each of them restitution and possession of the premises at issue herein, damages for holding over in the amount of $13.50 per day from June 1, 1977 until and through the date of judgment, for a total of $2268.00, a reasonable attorneys fee in the amount of $2732.00, together with costs of suit according to a Memorandum of Costs.

Let judgment be entered accordingly.

Dated: Nobember 18, 1977.

HAROLD I. CHERNESS, JUDGE,
Culver Municipal Court

§51. Equal Rights Without Regard to Race, Religion in Business Places

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin.

(1905 p. 553, 1919 p. 309, 1923 ch. 235, 1959 ch. 1866, 1961 ch. 1187, 1974 ch. 1193)

§51.5. Equal Rights Without Discrimination

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, refuse to buy from, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, or sex of such person or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

As used in this section "person" includes any person, firm, association, organization, partnership, business trust, corporation, or company.

(1976 ch. 396)

§51.7. Freedom from Intimidation

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.

(1976 ch. 1293)

Note: This act shall be known, and may be cited, as the Ralph Civil Rights Act of 1976.

§51.8. Franchisor Discrimination

No franchisor shall discriminate in the granting of franchises solely because of the race, color, religion, sex, or national origin of the franchisee and the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area in which the franchise is located. Nothing in this section shall be interpreted to prohibit a franchisor from granting a franchise to prospective franchisees as part of a program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor.

(1980 ch. 1303)

§52. Denial of Equal Rights — Penalty

(a) Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 or 51.5 of this code, is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars ($250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 or 51.5 of this code.

(b) Whoever denies the right provided by Section 51.7, or whoever aids incites, or conspires in such denial, is liable for each and every such offense for the actual damages, and ten thousand dollars ($10,000) in addition thereto suffered by any person denied such right. In the case of multiple offenders, such ten-thousand-dollar ($10,000) fine shall be prorated between them.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights hereby secured, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein

described, the Attorney General, any district attorney or city attorney, or any person aggrieved by the pattern or practice may bring a civil action in the appropriate court by filing with it a complaint (1) signed by the officer (or in his or her absence the individual acting on behalf of the officer) or by the person aggrieved, (2) setting forth facts pertaining to the pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice, as he or she deems necessary to insure the full enjoyment of the rights herein described.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, or national origin, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in such action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In such action the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved party.

(1905 p. 553, 1919 p. 309, 1923 ch. 235, 1959 ch. 1866, 1974 ch. 1193, 1976 chs. 366, 1293, 1978 ch. 1212, 1981 ch. 521, eff. Sep. 16, 1981)

Note: California has experienced an alarming increase in violent acts motivated by racial, religious, and ethnic antagonisms, which has been encouraged by anticivil rights groups and associations, whose strident hostility and proneness to overt action imperiling both person and property has grown in recent months. Accordingly, as it is imperative that all essential legal tools be made available to individuals who must look to our system of law for relief and redress, it is necessary that this act take effect at the earliest possible date.

§53. Conditions on Ownership or Use of Real Property by Reason of Race, Color, Religion Void

(a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified sex, race color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's sex, race, color, religion, ancestry, or national origin is void.

(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's sex, race, color, religion, ancestry, or national origin is void.

(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court takes judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code.

(1961 ch. 1877, 1965 ch. 299, 1974 ch. 1193)

Note: Section 26 of Article I of the California Constitution, an initiative measure approved by the voters on November 3, 1964, prohibited the state, or any subdivision or agency thereof, from denying, limiting or abridging the right of any person to decline to sell, lease or rent residential real property to any person he chooses. This was held unconstitutional by the California Supreme Court in Mulkey v. Reitman, 64 Cal. 2d 529; 50 Cal.Rptr. 881; 413 P.2d 825 (1966); affirmed by the United States Supreme Court in Rietman v. Mulkey, 387 U.S. 369; 18 L.Ed. 2d 830, 87 Sup.Ct. 1627 (1967).

§ 2. Supreme Court; justices; time for convening; concurrence required for judgment; acting chief justice

Sec. 2. The Supreme Court consists of the Chief Justice of California and 6 associate justices. The Chief Justice may convene the court at any time. Concurrence of 4 judges present at the argument is necessary for a judgment.

An acting Chief Justice shall perform all functions of the Chief Justice when the Chief Justice is absent or unable to act. The Chief Justice or, if the Chief Justice fails to do so, the court shall select an associate justice as acting Chief Justice. (Added Nov. 8, 1966. Amended Nov. 5, 1974.)

Former section 2 was repealed Nov. 8, 1966. See, now this section and § 14.

1974 Amendment. Substituted "the Chief Justice" for "he".

Law Review Commentaries

Appellate cases: the value of oral argument. A.S. Cutler (1958) 44 A.B.A.J. 831.

Appellate court advocacy: the importance of oral argument. George Rossman (1959) 45 A.B.A.J. 675.

California merit plan for judicial selection. (1968) 43 S. Bar J. 156.

Case dispositions by the California Supreme Court: Proposed alternatives. (1979) 67 C.L.R. 788.

Personal stare decisis. Reed C. Lawlor (1967) 41 So.Cal.L.Rev. 73.

Rehearing in American appellate courts. David W. Louisell and Ronan E. Degnan (1956) 44 C.L.R. 627.

Selection of interim justices in California: An empirical study. (1980) 32 Stan.L.R. 433.

Some observations about California courts of appeal. Roy A. Gustafson (1971) 19 U.C.L.A. Law Rev. 167.

Specialized appellate counsel: his importance, necessity and usefulness. Frederick Bernays Weiner (1959) 45 A.B.A.J. 677.

Supreme Court and the state bar. Burnham Enersen (1959) 34 S. Bar J. 893.

Library references

Judicial system in California. Reports of Assembly Interim Committee on Constitutional Amendments, Part II, 1961-1963, vol. 27, No. 2. Vol. 2 of Appendix to Journal of the Assembly, Reg.Sess., 1963.

Revision of the judicial article of the Constitution. Report of Assembly Interim Committee on Constitutional Amendments. 1959-1961, p. 34, vol. 27, No. 1, Vol. 2 of Appendix to Journal of the Assembly, Reg.Sess., 1961.

United States Supreme Court

Judicial immunity. Supreme Court of Virginia v. Consumers Union, Etc., 1980, 100 S.Ct. 1967.

Index to Notes

In general ½
Number of judges required for judgment 2
Oral argument 1

½. In general

Word "judges" as used in this section which states that concurrence of four "judges" present at the argument is necessary for a judgment includes assigned judges pro tempore. Mosk v. Superior Court of Los Angeles County (1979) 159 Cal.Rptr. 494, 601 P.2d 1030, 25 C.3d 474.

1. Oral argument

Under this section, as proposed by the constitution revision commission, oral argument before the California supreme court may be waived and, if held, a justice not present at the argument may, pursuant to stipulation of the parties, be one of the four justices necessary to pronounce a judgment. Op.Leg.Counsel, 1966 S.J. 1047.

2. Number of judges required for judgment

Since one judge assigned to the supreme court to replace a disqualified supreme court justice has the power and authority of a supreme court justice in the assigned case, including the power to cast the decisive vote, it follows that four or more duly assigned judges have the authority to render a valid decision or judgment in a case before the supreme court. Mosk v. Superior Court of Los Angeles County (1979) 159 Cal.Rptr. 494, 601 P.2d 1030, 25 C.3d 474.

§ 6. Judicial Council

Sec. 6. The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges of superior courts, 3 judges of municipal courts, and 2 judges of justice courts, each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house.

Council membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure.

To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.

The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

Judges shall report to the Judicial Council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned.

(Added Nov. 8, 1966. Amended Nov. 5, 1974.)

Former section 6 was repealed Nov. 8, 1966. See, now § § 4, 16; Gov.C. § 69741.5.

Prior to repeal former section 6 was amended Nov. 6, 1962 and Nov. 3, 1964.

1974 Amendment. Eliminated the use of such words as "chairman", "him", and "he" and substituted neutered versions.

Law Review Commentaries

Arguments against notice of alibi provisions on basis of due process of law. (1975) 7 Southwestern L.R. 370.

California courts in historical perspective. William Wirt Blume (1970) 22 Hast.L.J. 121.

California legislation: Sources unlimited. Emil Steck, Jr. (1975) 6 Pacific L.J. 536.

California merit plan for judicial selection. (1963) 43 S.Bar J. 156.

Central administration of a state judicial system. Hon. Roger J. Traynor (1965) 40 S.Bar J. 678.

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CALIFORNIA RULES OF COURT

Rule 995. Chief justice as chairman of judicial council

A reference in the statutes or rules of this state to the Chairman of the Judicial Council means the Chief Justice of California, who shall act in that capacity for all purposes.

Adopted, eff. Nov. 15, 1974.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on July 7, 1982, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

California Supreme Court
4250 State Bldg., 455 Golden Gate Ave.
San Francisco, California 94102

Hon. Judge Harold I. Cherness
Culver Municipal Court
4130 Overland Ave.
Culver City, California 90230

Eugene C. Gratz
Gratz and Starler
1901 Avenue of the Stars
Suite 1232
Los Angeles, California 90067

Clerk, California Court of Appeal
Second Appellate District
3580 Wilshire Boulevard
Third Floor
Los Angeles, California 90010

Clerk of the Los Angeles Superior Court, Presiding Judge
111 North Hill Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 7, 1982 at Santa Monica, California.

KIRK W. HARNEY
(Original signed)

Office - Supreme Court, U.S.
FILED
SEP 7, 1982
ALEXANDER L. STEVAS,
CLERK

No. 82 - 27

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARINA POINT, LTD., a limited partnership without subsidiaries or affiliates,

Petitioner,

v.

STEPHEN WOLFSON AND LOIS WOLFSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE C. GRATZ
GRATZ AND STARLER
1901 Avenue of the Stars
Suite 1232
Los Angeles, California 90067
Telephone: (213) 277-1232, 879-1232

Westside Law Publishers Santa Monica, California (213) 450-1965

c. That in other contexts some courts have determined that age can be an appropriate basis of classification does not raise a federal issue.

d. Even assuming that the California Supreme Court did change or raise the standard of analysis of prohibited discrimination under the California statute, no federal or constitutional question is presented.

e. Even assuming that the California Supreme Court's recognition of a possible exception for senior citizens' housing creates a vagueness in the statute, petitioner is without standing to assert such vagueness.

QUESTIONS PRESENTED

1. The petition should be denied for petitioner's failure to conform to the requirements of Supreme Court Rule 21 and meet the burden of demonstrating from the record that the United States Supreme Court has jurisdiction to review on certiorari.

2. The challenge to California's procedure for the appointment of interim Supreme Court Justices was not presented to the California Court by timely or proper petition and was therefore not considered or passed upon by that Court, so that this Court is without jurisdiction to review by certiorari.

3. Petitioner has waived any objection to California's Procedure for the appointment of interim Supreme Court Justices by failing to raise it by timely motion to the Court below at its first opportunity and by submitting itself to the jurisdiction of the Court without objection.

4. The petition fails to raise a federal question.

   a. The petition does not even purport to attack the actual holding of the California Supreme Court, that the California Civil Rights Act prohibits landlords' exclusion of the class of children from apartment housing accommodations.

   b. Petitioner's arguments that the California Supreme Court "ignored" the findings of the trial court with respect to children as a class, and decided the case on evidence outside the record, mean only that Petitioner believes that the judgment of the California Supreme Court is not adequately supported by the evidence or findings, and therefore presents merely an issue of evidence and inference not appropriately reviewable by this Court on certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82 - 27

MARINA POINT, LTD., a limited partnership without subsidiaries or affiliates,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. The petition should be denied for petitioner's failure to conform to the requirements of Supreme Court Rule 21 and meet the burden of demonstrating from the record that the United States Supreme Court has jurisdiction to review on certiorari.

2. The challenge to California's procedure for the appointment of interim Supreme Court Justices was not presented to the California Court by timely or proper petition and was therefore not considered or passed upon by that Court, so that this Court is without jurisdiction to review by certiorari.

3. Petitioner has waived any objection to California's Procedure for the appointment of interim Supreme Court Justices by failing to raise it by timely motion to the Court below at its first opportunity and by submitting itself to the jurisdiction of the Court without objection.

4. The petition fails to raise a federal question.

a. The petition does not even purport to attack the actual holding of the California Supreme Court, that the California Civil Rights Act prohibits landlords' exclusion of the class of children from apartment housing accommodations.

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c. That in other contexts some courts have determined that age can be an appropriate basis of classification does not raise a federal issue.

d. Even assuming that the California Supreme Court did change or raise the standard of analysis of prohibited discrimination under the California statute, no federal or constitutional question is presented.

e. Even assuming that the California Supreme Court's recognition of a possible exception for senior citizens' housing creates a vagueness in the statute, petitioner is without standing to assert such vagueness.

PRELIMINARY STATEMENT

In *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115, the California Supreme court held, under California law, that a landlord's exclusion of all children, as a class, from apartment accommodations was unlawful, and reversed the judgment of the trial court in the underlying unlawful detainer action, which had evicted Respondents (Defendants-Appellants below) from their apartment pursuant to Petitioner's termination of their lease on the sole ground that they had had a child.

More precisely, the California Supreme Court reaffirmed in *Wolfson* its long-established construction of the State's civil rights law, the Unruh Civil Rights Act, California Civil Code, §51 *et seq.*, as confirmed by legislative acceptance, that the Act prohibits "all arbitrary discrimination" (*In re Cox* (1970) 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992), and held, pursuant to that standard, that the exclusion by Petitioner from its apartment units of all children, as a class or group, because such exclusion was based upon class or group membership alone rather than individual's conduct, was such arbitrary discrimination as the Act prohibited.[1]

---

[1]By settled principles of California Law, "arbitrary discrimination" in violation of the standards contained in the California Civil Rights Act states an affirmative defense to an unlawful detainer action. *Abstract Investment Co. v. Hutchinson* (1962) 204 Cal. App. 2d 242, 22 Cal. Rptr. 309. Petitioner, in the proceeding below, admitted that its sole reason for its refusal to renew Respondents' lease, pursuant to which the unlawful detainer action was brought, was the presence of Respondents' minor child. Thus, only a question of law was presented: whether the exclusion of children as a class from apartment accommodations was "arbitrary discrimination" under the California Civil Rights Law.

The Petition for Writ of Certiorari ("Petition") does not raise—or even purport to raise—any constitutional challenge to the holding of the California Supreme Court that a landlord's exclusion of children as a class from apartment housing accommodations is unlawful. At no time does the Petition even suggest that the Unruh Act, as construed by the California Supreme Court in *Wolfson*, violates the Fourteenth Amendment to the United States Constitution, or any other constitutional provision. Indeed, by adverting to the statutes of ten other states which prohibit the exclusion of families from rental housing on the ground that there is a child in the family, Petitioner effectively concedes that the prohibition of such discrimination is within the states' police power, and therefore immune from attack under the Fourteenth Amendment.

Rather, Petitioner seeks to predicate jurisdiction to review by certiorari upon two other issues, one of which was neither presented to nor passed upon by the California Supreme Court, or any other court below and the other one of which is, in effect, merely an argument that the judgment of the California Supreme Court is not properly supported by the evidence in the record.

Thus, the Petition fails to show either that this Court has jurisdiction to review the judgment of the California Supreme Court, that any federal or constitutional question is presented, or that any reason exists for this Court's exercise of its discretion to grant certiorari (U.S. Supreme Court Rule 17.)

STATEMENT OF THE FACTS

The facts are recited in the Opinion of the California Supreme Court (Appendix "A" to Petition), and need be but briefly stated. Respondents STEPHEN AND LOIS WOLFSON resided as tenants in Petitioner's apartment complex. The Wolfsons' lease contained a provision prohibiting occupancy by children under 18 years of age. Petitioner rented to families with children at the time

Respondents leased their unit, but subsequently promulgated a policy to exclude all families with children and pregnant females. In September 1975 a son, Adam, was born to Respondents; Respondents continued to reside in the apartment. In November, 1976, Petitioner discovered the presence of the child and informed Respondents that their lease would not be renewed. It was admitted by Petitioner that its sole reson for refusing to renew the lease was the presence of the child, and that but for the child the lease would have been renewed. After two short extensions of the lease granted by Petitioner, during which Respondents unsuccessfully sought alternative housing accommodations for themselves and their child, Respondents refused to surrender the apartment, and Petitioner initiated an unlawful detainer action in the Municipal Court for the Culver Judicial District, County of Los Angeles, California. In their answer to the complaint the Wolfsons alleged as an affirmative defense, *inter alia*, that Petitioner's refusal to renew their lease, and their exclusion by Petitioner from the apartment complex, on the sole ground that they had had a child, was "arbitrary discrimination" in violation of the California Civil Rights Act (Unruh Act), California Civil Code, §51 *et seq.* There is no support in the record for the gratuitous comments by Petitioner in the Statement of Facts (Petition, p. 3.) that the Wolfsons concealed the presence of the child or represented that he was visiting. (See Findings of Fact and Conclusions of Law, Appendix "D" to Petition.)

Judgment in the trial court was for Petitioner, as Plaintiff. In a Memorandum Opinion the trial court, although recognizing that Petitioner, as a "business establishment," was subject to the Unruh Act, concluded that the practice in question did not violate any prohibited discrimination because discrimination against children or families with children was not expressly prohibited by the wording of the Statutes or by prior judicial determination. The California Supreme Court reversed on that ground.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED FOR PETITIONER'S FAILURE TO CONFORM TO THE REQUIREMENTS OF SUPREME COURT RULE 21.

Scattered throughout the Petition are passing references to various documents purportedly filed at one stage or another of the proceedings below in which, in some unspecified form, the questions sought to be reviewed by this Court are said to have been "raised" in the state court proceedings. None of the documents referred to, which are necessary for this Court's jurisdiction, are set forth or quoted in the Petition or contained in its Appendix.

Rule 21.1(h) of the United States Supreme Court Rules provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (. . .) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.
>
> "Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix. . . ."

Rule 21.1(h), by its terms, requires the Petition to demonstrate affirmatively the jurisdictional facts contained in the record below, including particularly the facts showing that the federal questions were properly and timely raised at the appropriate stage of the proceeding below and passed upon by the court whose judgment is sought to be reviewed as part of its decision, since those elements are conditions to the Supreme Court's jurisdiction. It is settled that the burden is upon the petitioner to demonstrate those jurisdictional facts to this Court.

Although the Petition claims (p.5) that certain issues, said to be federal questions, were raised in certain briefs (none of which antedate the transfer of the cause to the California Supreme Court, and only one of which antedates that Court's judgment), no portions of those briefs or of the record are specified or set forth, nor are any contained in the appendix to the Petition.

Therefore, this Court has nothing before it from which it can determine that it has jurisdiction to review the judgment of the California Supreme Court herein. Since, by well settled principles, the burden is upon the Petitioner to demonstrate affirmatively that the U.S. Supreme Court has jurisdiction, Petitioner's failure to make the necessary showing requires denial of the Petition.

II.

THE CHALLENGE TO CALIFORNIA'S PROCEDURE FOR THE APPOINTMENT OF INTERIM SUPREME COURT JUSTICES WAS NOT PRESENTED TO THE CALIFORNIA COURT BY TIMELY OR PROPER PETITION AND WAS THEREFORE NOT CONSIDERED OR PASSED UPON BY THAT COURT.

Petitioner seeks to raise—for the first time—a constitutional challenge to the California procedure for the

appointment of interim Supreme Court Justices, presumably under the due process clause of the Fourteenth Amendment to the United States Constitution. This issue has never been presented to or determined by the California Supreme Court, or any other court below in this action, and this Court is therefore without jurisdiction.

Petitioner refers enigmatically ("Statement of the Facts," Petition, p. 5) to a document entitled "Supplemental Brief in Support of Petition for Rehearing" which Petitioner *attempted* to file with the California Supreme Court on March 2, 1982 (seven days after Petitioner's filing of its Petition for Rehearing on February 23, 1982, which was the date upon which the time for filing such Petition expired). Petitioner admits that the issue sought to be raised was entirely new, never having been raised before to the California Court, and was only raised for the first time in the purported "Supplemental Brief." Inasmuch as the document attempted to present an entirely new issue it was not, in fact, a "supplemental" brief, but nothing more than an untimely Petition for Rehearing. Having been filed not only after the filing of the Petition for Rehearing, but after the time for filing such Petition had expired, it was both untimely and improper under the California Rules of Court, and, quite properly, the Clerk of the Supreme Court rejected the submission and refused to file it.

The procedure for petitioning California appellate courts, including the California Supreme Court, for rehearing is set forth in Rule 27 of the California Rules of Court. The provision for time of filing of the petition (Rule 27(b)) is mandatory, by its own terms:

> "(a) [Power to grant rehearing] The Supreme Court or Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without

> issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.
>
> "(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court, *must* serve and file a petition therefor within 15 days after the filing of the decision." [Emphasis added.][2]

Thus the only document in which petitioner even claims to have raised the question sought to be reviewed was untimely filed, rejected for filing by the Clerk of the California Supreme Court, and has therefore never been either presented to or passed upon by the California Supreme Court, which denied the Petition for Rehearing without opinion (Petition, Appendix C, page 56).[3]

---

[2]The full text of Rules 15, 27 and 28 of the California Rules of Court are set forth in Appendix "A" to this brief.

---

[3]The document would also appear to be unauthorized under the California Rules of Court which require the grounds and arguments on the basis of which a hearing or rehearing by the California Supreme Court is sought to be contained in the single-document petition. See California Rules of Court, Rule 28(d)(3), Appendix A to this brief, p. 29:

> "The Petition shall be a single document including a brief in support of the Request for Hearing. All contentions in support of the Petition shall be included therein, including all legal authorities and argument. . . ."]

Moreover the California Supreme Court will not hear issues raised

(footnote continued on following page)

Proper and timely presentation of the federal question to the court whose judgment is sought to be reviewed is a prerequisite to the United States Supreme Court's jurisdiction to review the judgment on Writ of Certiorari. (Rules of the United States Supreme Court, Rule 21.1(h).) In order to give the Supreme Court of the United States jurisdication to review a final judgment of the highest court of a state, the claim of federal right must be asserted at the proper time and in a proper manner by pleading, motion or other appropriate action under the state system of pleading and practice; and upon the question of whether or not such claim has been so asserted, the decision of the state court is binding upon the United States Supreme Court when it is clear that such decision was not for purposes of evading the claim of federal right. *Hartford Life Ins. Co. v. Johnson* (1919) 249 U.S. 490, 39 S.Ct. 336, 63 L.Ed. 722. To confer jurisdiction to review the state court decision, moreover, it must be shown not only that there was a federal question which might have been raised and decided in the court below, but that the issue was actually brought to the attention of the court and the judgment founded upon a decision upon that issue. *Grand Gulf Railroad & Banking Co. v. Marshall* (1852) 53 U.S. 165, 13 L.Ed 938. Compare also such cases as *De Baker v. Brainard* (1964) 396 U.S. 28, 70 S.Ct. 163, 24 L.Ed.2d 148; *Ellison v. Koswig* (1928) 276 U.S. 598, 48 S.Ct. 320, 72 L.Ed. 724.

In the case at bar, it is manifest that not only was the issue now sought to be raised by Petitioner neither timely

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for the first time in a Petition for Rehearing (*Sanders v. Howard Park Co.* (1948) 86 Cal. App. 2d 721, 195 P.2d 898; *People v. Mascotti* (1962) 206 Cal. App.2d 772, 24 Cal. Rptr. 679; *City of San Marino v. Roman Catholic Archbishop of Los Angeles* (1960) 180 Cal. App. 2d 657, 4 Cal. Rptr. 547; see *Ritchey v. Villa Nueva Condominum Association* (1978) 81 Cal. App. 3d 688, 698, 146 Cal. Rptr. 695, 701-702; compare United States Supreme Court Rule 21.3).

nor properly presented to the California Supreme Court, but that the California Supreme Court never had the issue before it for determination, and therefore never determined the issue. Under similar circumstances, where no federal question was raised prior to a Petition for Rehearing in the state Supreme Court, which was denied without more, and the record, as here, contained no actual showing of the presentation of the issue to the court below upon which the Supreme Court's jurisdiction could be based, an appeal was required to be dismissed for want of a properly presented substantial federal question. *McGarrity v. Delaware River Bridge Commission* (1934) 292 U.S. 19, 54 S.Ct 565, 78 L.Ed. 1095, *reh. den.* 292 U.S. 607, 54 S.Ct. 771, 78 L.Ed. 1468.

Numerous cases hold that certiorari will be denied or where granted, dismissed as improvidently granted, where the record fails to disclose that the petitioner raised the issue in the state courts below and/or that the state court determined the issue. (See, e.g., *Missouri P.R. Co. v. Hanna* (1924) 266 U.S. 184, 45 S.Ct. 36, 69 L.Ed. 235; *Millingar v. Hartupee* (1868) 73 U.S. 258, 18 L.Ed. 829; *Abbott v. Tacoma Bank of Commerce* (1899) 175 U.S. 409, 20 S.Ct. 153, 44 L.Ed. 217; *Montana ex rel. Haire v. Rice* (1907) 204 U.S. 291, 27 S.Ct. 281, 51 L.Ed. 490; *Cockroft v. Vose* (1872) 81 U.S. 5, 20 L.Ed. 875; *Warfield v. Chaffe* (1876) 91 U.S. 690, 23 L.Ed. 383.) In *New York Life Ins. Co. v. Hendren* (1876) 92 U.S. 286, 23 L.Ed. 709, it was held that the jurisdiction of the United States Supreme Court over decisions of state courts is derived solely from the questions presented and decided, and that it must appear in the record that such questions were actually presented to the court below and not merely that they might have been brought into the case. To give the Supreme Court jurisdiction, it must appear that the point on which Plaintiff relies was made in

the Court below and actually decided against the party seeking review by the state court. *Maxwell v. Newbold* (1856) 59 U.S. 511, 15 L.Ed. 506; *Hoyt v. Shelden* (1962) 66 U.S. 518, 17 L.Ed. 65; *McGoldrick v. Compagnie Generale Transatlantique* (1940) 309 U.S. 430, 84 L.Ed. 849, 60 S.Ct. 670.

Therefore, the failure of Petitioner to raise the issue by timely Petition for Rehearing to the California Supreme Court, as required under California Practice, as a result of which it was never presented to or ruled upon the California Court, precludes review of the issue here.

III.

PETITIONER HAS WAIVED ANY OBJECTION TO CALIFORNIA'S PROCEDURE FOR THE APPOINTMENT OF INTERIM SUPREME COURT JUSTICES BY FAILING TO RAISE IT BY TIMELY MOTION TO THE COURT BELOW AT ITS FIRST OPPORTUNITY AND BY SUBMITTING ITSELF TO THE JURISDICTION OF THE COURT WITHOUT OBJECTION.

Even if the challenge to the appointment procedure had been included in the Petition for Rehearing to the California Supreme Court filed within the statutory period, it would nonetheless have been untimely, Petitioner having waived the issue by failing to raise it at the first opportunity and having submitted itself to the jurisdiction of the California Supreme Court without objection.

As the Petition indicates ("Statement of the Case," Petition, p. 3) the California Court of Appeals transferred the case to itself for hearing and determination (as permitted under California Rules of Court, Rule 62) and

filed a decision. The Honorable Otto M. Kaus, now a Justice of the California Supreme Court, was then Presiding Justice of Division 5 of the California Court of Appeals for the Second Appellate District, and was a participating member of the panel which determined the cause. (See Vacated Opinion, *Marina Point, Ltd. v. Wolfson*, published at 158 Cal. Rptr. 669 at p. 679, showing Kaus, J., concurring.)

By order of the Chief Justice of California filed June 18, 1981, this matter was placed upon the Supreme Court calendar for oral argument on August 5, 1981. (Copies of the Order and Calendar Notice are included in Appendix B hereto). At that time, there were two vacancies on the California Supreme Court by reason of the death of Justice Wiley Manual and the resignation of Justice William Clark, and Justices Otto M. Kaus and Allen E. Broussard had been appointed to the vacancies by California Governor Edmund Brown, and approved by the California Judicial Council, so that their confirmation and appointment to the bench was then anticipated as a relative certainty. Accordingly, the Chief Justice of California, pursuant to the very procedure under attack herein, had appointed them to participate in the panels hearing the cases placed upon the hearing calendar of the Supreme Court for August 3, 4 and 5, 1981.

Section 170a of the California Code of Civil Procedure prohibits the participation in an appellate or higher appellate proceeding by a judge or justice who has participated in a determination thereof below:

> "No justice or judge before whom a cause or question may have been tried or heard, shall sit or act, in any appellate tribunal, on the trial or hearing of such cause or question."

By operation of this provision, Justice Kaus, even if confirmed, was barred as a matter of law from partici-

pating in the California Supreme Court panel hearing this case.

This problem was called to Petitioner's attention by a letter dated June 23, 1981 to the Chief Justice of California, a copy of which was transmitted to Petitioner's counsel. (A copy of the letter is contained in Appendix C hereto.)

Therefore, as early as June 23, 1981, well before the hearing, and more than seven months before the filing of the opinion by the California Supreme Court, since there were then two vacancies on the California Supreme Court one of which was proposed to be filled by Justice Kaus, who was disqualified from hearing the case, Petitioner knew that a Justice Pro Tem would necessarily be appointed by the Chief Justice to participate in the decision of the cause, and knew presumptively, therefore, that such Justice would necessarily be appointed pursuant to the procedure Petitioner now seeks to challenge. Nonetheless, Petitioner submitted itself to the jurisdiction of the Court without objection.

Under these circumstances, since Petitioner knew of the problem and could have interposed a timely constitutional objection to the appointment procedure by motion or petition directed to the California Supreme Court, even the Petition for Rehearing timely filed was insufficient to raise the issue (see cases cited, *ante* fn. 3), precluding review by the United States Supreme Court on Writ of Certiorari; and where, as is the actual case here, it was *not* raised by timely or proper Petition for Rehearing, manifestly this Court is without jurisdiction.[4]

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[4]Petitioner's argument that *two* justices of the California Supreme Court panel were appointed by the Chief Justice pursuant to the procedure under attack, and the inclusion of Justice Mathew O. Tobriner as such "appointed" justice, must be dismissed as frivolous; the late Justice Tobriner was a sitting California Supreme Court

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Justice during the entire process of Petition, Answer and briefing before that Court, and sat and participated with the panel which heard the oral arguments; he resigned from the judiciary effective January 4, 1982, about a month before the filing on February 8, 1982 of the Opinion, which he authored. It is obvious, therefore, that it was as a sitting Justice that he made his decision and wrote the opinion.

Certain of the issues respecting the pro tem appointment process that Petitioner now seeks to bring before this Court as "constitutional" issues have been determined by the California courts under that state's laws and constitution, and are now settled California constitutional law. See *Mosk v. Superior Court* (1979) 25 Cal. 3d 474, 447-448, 159 Cal. Rptr. 494, 503, 601 P.2d 1030, holding that since the Chief Justice of the California Supreme Court has constitutional authority to assign judges from lower courts to the Supreme Court to replace disqualified Supreme Court Justices, it is not necessary for the California Supreme Court to adopt the United States Supreme Court's procedure of letting the lower court judgment stand where there is no quorum of qualified justices. In *Estate of Zahn v. Security Pacific National Bank* (1971) 16 Cal. App. 3d 106, 93 Cal. Rptr. 810, *cert. den.*, 404 U.S. 938, 92 S.Ct 269, 30 L.Ed.2d 251, *reh. den.* 404 U.S. 996, 92 S.Ct 5341, 30 L.Ed.2d 549, the appellant unsuccessfully contended that the trial judge lacked authority and jurisdiction to sit when the matter was heard and determined, on the ground that he was a retired judge of the superior court assigned by the Chief Justice of the California Supreme Court, Roger J. Traynor. See also *Western Sierra, Inc. v. Ramos* (1979) 97 Cal. App. 3d 484, 486-487, 158 Cal. Rptr. 753, 755, holding that a trial judge, who had the case pending before him at the time of his retirement, could decide it after his retirement upon reappointment by the Chief Justice for the specific purpose of hearing the case to its final determination. See also *Martello v. Superior Court* (1927) 202 Cal. 400, 406, 261 P. 476; *Reimer v. Firpo* (1949) 94 Cal. App. 2d 798, 800-801, 212 P.2d 23, *Garthlan v. C.A. Hooper & Co.* (1918) 177 Cal. 414, 429, 170 P. 1115; *Bartholomae Oil Corp. v. Superior Court* (1941) 18 Cal. 2d 726, 729-730, 117 P.2d 674).

IV.

THE PETITION FAILS TO RAISE A FEDERAL QUESTION.

A. The Petition Does Not Even Purport To Attack The Actual Holding Of The California Supreme Court Or Its Construction Of The Unruh Act.

At the threshhold, it must be noted that the Petition does not even purport to attack as unconstitutional the actual holding of the California Supreme Court, that age discrimination in housing, the exclusion of children from apartment accommodations, is prohibited under the California Civil Rights Act, California Civil Code, §51, *et seq.*, or to argue against the constitutionality of the construction of the Act by the California Supreme Court.

Such an attack could be based *only* upon an argument that the Court's construction of the Act, by prohibiting Petitioner from discriminating against children and families with children, was a denial to Petitioner of *its* rights under the Equal Protection and/or Due Process Clauses of the Fourteenth Amendment of the United States Constitution. An examination of the "Questions Presented" (Petition, p. 2), however, shows that no such issue is specified, and it is well settled that on Certiorari, except for jurisdictional questions, not at issue here, this Court ordinarily limits consideration to the questions presented by the Petition for the Writ. *Alice State Bank v. Houston Pasture Co.* (1918) 247 U.S. 240, 62 L.Ed. 1096, 38 S.Ct. 496; *Webster Electric Co. v. Splitdorf Electrical Co.* (1924) 264 U.S. 463, 68 L.Ed. 792, 44 S.Ct. 342; *Steele v. Drummond* (1927) 275 U.S. 199, 72 L.Ed. 238, 48 S.Ct. 53; *Sanitary Refrigerator Co. v. Winters* (1929) 280 U.S. 30, 74 L.Ed. 147, 50 S.Ct. 9; *Gunning v. Cooley* (1930) 281 U.S. 90, 74 L.Ed. 720, 50 S.Ct. 231; *Olson v. United States* (1934) 292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704; *Helvering v. Taylor* (1935) 293 U.S.

507, 79 L.Ed. 623, 55 S.Ct. 287; *Clark v. Williard* (1935) 294 U.S. 211, 79 L.Ed. 865, 55 S.Ct. 356, 98 ALR 347; *Washington, Virginia & Maryland Coach Co. v. NLRB* (1937) 301 U.S. 142, 81 L.Ed. 965, 57 S.Ct. 648; *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.* (1938) 304 U.S. 159, 82 L.Ed. 1265, 58 S.Ct. 842; *General Talking Pictures Corp. v. Western Electric Co.* (1938) 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849; *Helis v. Ward* (1939) 308 U.S. 365, 84 L.Ed. 327, 60 S.Ct. 283, *reh. den.* 308 U.S. 640, 84 L.Ed. 531, 60 S.Ct. 385; *National Licorice Co. v. NLRB* (1940) 309 U.S. 350, 84 L.Ed. 799, 60 S.Ct. 569; *Dickenson Industrial Site, Inc. v. Cowan* (1940) 309 U.S. 382, 84 L.Ed. 819, 60 S.Ct. 595, *reh. den.* 309 U.S. 698, 84 L.Ed. 1037, 60 S.Ct. 806; *Memphis Natural Gas Co. v. Stone* (1948) 335 U.S. 80, 92 L.Ed. 1832, 68 S.Ct. 1475 (per opinion of Reed, Douglas, and Murphy, JJ.); *United States v. Penn Foundry & Mfg. Co.* (1949) 337 U.S. 198, 93 L.Ed. 1308, 69 S.Ct. 1009, *reh. den.* 338 U.S. 840, 94 L.Ed. 514, 70 S.Ct. 32; *Radio Officers' Union, etc. v. NLRB* (1954) 347 U.S. 17, 98 L.Ed. 455, 74 S.Ct. 323, 41 ALR2d 621; *Mazer v. Stein* (1954) 347 U.S. 201, 98 L.Ed. 630, 74 S.Ct. 460, *reh. den.* 347 U.S. 949, 98 L.Ed. 1096, 74 S.Ct. 637; *United Brotherhood of Carpenters & Joiners v. NLRB* (1958) 357 U.S. 93, 2 L.Ed. 2d 1186, 78 S.Ct. 1011; *Knetsch v. United States* (1960) 364 U.S. 361, 5 L.Ed. 2d 128, 81 S.Ct. 132; *Beck v. Washington* (1962) 369 U.S. 541, 8 L.Ed. 2d 98, 82 S.Ct. 955, *reh. den.* 370 U.S. 965, 8 L.Ed. 2d 834, 82 S.Ct. 1575; *Namet v. United States* (1963) 373 U.S. 179, 10 L.Ed. 2d 278, 83 S.Ct. 1151; *J.I. Case Co. v. Borak* (1964) 377 U.S. 426, 12 L.Ed. 2d 423, 84 S.Ct. 1555; *Ryan v. United States* (1964) 379 U.S. 61, 13 L.Ed. 2d 122, 85 S.Ct. 232; *Pierson v. Ray* (1967) 386 U.S. 547, 18 L.Ed. 2d 288, 87 S.Ct. 1213; *United States v. O'Brien* (1968) 391

U.S. 367, 20 L.Ed. 2d 672, 88 S.Ct. 1673, *reh. den.* 393 U.S. 900, 21 L.Ed. 2d 188, 89 S.Ct. 63; *Winters v. United States* (1968) 21 L.Ed.2d 80, 89 S.Ct. 57 (per Douglas, J., as Circuit Justice).

Absent any such constitutional issue, the purported questions presented in Point II. of the Petition devolve to a series of petty cavils, none of which is a federal constitutional question, or important.

B. Petitioner's Arguments That The California Supreme Court "Ignored" The Findings Of The Trial Court Are Merely An Argument That The Judgment Is Not Adequately Supported By The Evidence.

Petitioner's first arguments, that the California Supreme Court "ignored" the Findings of the Trial Court and decided the case based upon evidence not presented is actually merely an argument that the judgment is, in the Petitioner's opinion, not adequately supported by the findings or evidence. Those arguments, even if true, would present merely an issue of evidence and inference not appropriately reviewable by the United States Supreme Court on certiorari. *General Talking Pictures Corp. v. Western Electric Co.* (1938) 304 U.S. 175, 82 L.Ed. 1273, 15 S.Ct. 849.

First of all, Petitioner simply ignores the California Supreme Court's *holding* that, as a matter of California law, a landlord's blanket exclusion of all families with minor children is, or would still be, impermissible under the Unruh Act as "arbitrary discrimination" *even if the sweeping generalizations about the entire class of children made by the Culver Municipal Court Trial Judge were actually true.* (Opinion, Petition, Appendix "A", p. 39, *et seq.*) That holding undercuts Petitioner's argument that the trial court's findings were "ignored" by the California

Supreme Court, thus denying Petitioner due process, since it is clear that the California Supreme Court did consider them, but rejected them as insufficient as a matter of state law, (citing *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 708, 98 S.Ct. 1370, 1375, 55 L.Ed.2d 657). In fact, the California Court devoted an entire Point to its discussion of that proposition. Petitioner's actual argument, therefore, is only that it disagrees with the California law.

It is also submitted that the California Supreme Court, in determining the housing and civil rights policies of the state, is not necessarily bound by "findings" of a local trial court which purport to apply universally to an entire class, such as the class of children, any more than it would be bound by such "findings" with respect to the class characteristics of a racial, ethnic, religious or national group.

Petitioner's next argument, that the California Supreme Court based its decision upon "evidence not presented to the trial court," upon closer analysis, is actually nothing more than that the Calilfornia Court referred to published legal, statistical, sociological and demographic materials, as well as to policy statements enacted by the California Legislature and set forth in the California Statutes. The reference to, and reliance upon, such published materials pursuant to decisions of important public policy by state and federal courts has not previously appeared to have been thought a denial of due process. See *Taxpayers Assoc. of Weymouth Township v. Weymouth Township* (1976) 71 N.J. 249, 364 A.2d 1016; *Shepard v. Woodland Township Commission & Planning Commission* (1976) 71 N.J. 230, 364 A.2d 1005; *Green v. Superior Court* (1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168; compare *Brown v. Board of Education* (1954) 347 U.S. 483, 98 L.Ed.2d 873, 74 S.Ct. 686.

C. That In Other Contexts Some Courts Have Determined That Age Can Be An Appropriate Basis Of Classification Does Not Raise A Federal Issue.

Petitioner's next argument is that in other contexts some courts have determined that age can be an appropriate basis of classification, as in *Massachusetts Board of Retirement v. Mergia* (1976) 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520. No reason is given, nor is any apparent, why that raises a constitutional issue.[5]

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[5]Petitioner grie ously misstates the holding in *Halet v. Wend Investment Co.* (CA 9, 1982) 672 F.2d 1305. The holding of that case is actually coterminous with that in *Marina Point, Ltd. v. Wolfson* and, it is submitted, properly sets forth the constitutional issues and standards that would necessarily have to be applied if the constitutional issues were required to be reached. In *Halet*, the Ninth Circuit held that, where "state action" was involved on the part of the discriminating entity, the plaintiff's allegations that he was denied housing accommodations pursuant to that entity's policy of excluding families with children from its apartments was, as a matter of law, an allegation of a discrimination on the basis of deprivation of a "fundamental right" of privacy, procreation and family structure, so as to invoke the "strict scrutiny" test for the constitutionality of the exclusion. *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531. The case was remanded to the District Court for a determination of whether the defendant could show a "compelling state purpose" to substantiate the discrimination.

The California Supreme Court was not required to reach those constitutional issues in *Wolfson*, as it said, because of its determination that the discrimination violated state law. However, the reasoning of the Ninth Circuit in *Halet* indicates that a contrary ruling on the state law issues, requiring the Court to reach and determine the constitutional issues, would require a reversal of the trial court's judgment on those constitutional grounds.

D. Even Assuming That The California Supreme Court Did Change Or Raise The Standard Of Analysis Of Prohibited Discrimination Under The California Statute, No Federal Or Constitutional Question Is Presented.

Petitioner's next argument appears to be that the California Supreme Court has changed or raised the standard of analysis or scrutiny of prohibited discrimination to "strict scrutiny"—i.e., to require a compelling interest to justify a class exclusion. While it is clear from the Opinion that the California Court did no such thing,[6] even if the contention had merit no federal constitutional issue is presented, for it is well established that a decision of a state court on a matter of law which overrules principles or doctrines established by previous decisions does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on the Supreme Court of the United States. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107; *Central Land Co. v. Laidley* (1895) 159 U.S. 103, 15 S.Ct. 80, 40 L.Ed. 91; *Patterson v. Colorado* (1907) 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879; *Erie Railroad Co. v. Solomon* (1915) 237 U.S. 427, 35 S.Ct. 648, 59 L.Ed. 1033. The rule has been applied to arguments of "impairment of contract" by state court

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[6]The California Supreme Court's reference was to a "compelling *societal* interest," not a "compelling state purpose" (see Opinion, Petition, Appendix "A", p. 46) and the Court was clearly discussing policy considerations, not constitutional standards of scrutiny; the reference was pursuant to the Court's explanation of why age qualifications to a housing facility reserved for older citizens, which do serve such social interests, can be justified as "reasonable and permissive means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment, thus making an age restriction under those circumstances "reasonable" so as to be sustained under the Unruh Act.

decisions as to the meaning and scope of a statute, the validity of which, as here, has not been denied. *Moore-Mansfield Const. Co. v. Electrical Installation Co.* (1914) 234 U.S. 619, 34 S.Ct. 941, 58 L.Ed. 1503; *Cleveland and P.R. Co. v. Cleveland* (1914) 235 U.S. 50, 35 S.Ct. 21, 59 L.Ed. 127. These cases make it clear that even if the California Supreme Court had, in fact, altered California's standard for the determination of the lawfulness of discrimination under the Unruh Act, such change does not rise to a constitutional issue reviewable on certiorari by this Court.

E. Even Assuming That The California Supreme Court's Recognition Of A Possible Exception For "Senior Citizens" Housing Creates A "Vagueness" In The Statute, Petitioner Is Without Standing To Assert Such Vagueness.

Finally, Petitioner asserts, as a purported constitutional issue, that the California Supreme Court's indication of the possible existence of an exception for housing for senior citizens or the elderly makes the statute impermissibly vague.

First of all, Petitioner does not have standing to assert such "vagueness" of the statute, and therefore cannot raise such an issue for review by certiorari here: Marina Point excludes only children under eighteen, and does not purport to be a "senior citizens" housing accommodation, nor to have been designed to offer the specialized services and facilities required by such housing devoted to the needs of that or any other social group. It merely discriminates against children. It is well settled that, except in the area of First Amendment freedoms, a litigant does not have standing to assert the rights of absent third parties, or injuries to such third parties by which it is not, and cannot be, affected. See, *Flast v. Cohen* (1968) 392

U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 citing *Baker v. Carr* (1962) 369 U.S. 186, 204; *Heald v. District of Columbia* (1922) 259 U.S. 114, 123; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.* (1912) 226 U.S. 217.

Nor is Petitioner's position aided by attempting to describe the statute as "penal." While it is true that the Unruh Act, because it imposes a minimum level of damages in an action brought for a violation of its provision, could *in that context* arguably be described as "penal," that context does not exist in the case at bar. It has long been recognized in California, and indeed has been acknowledged by Petitioner in this action, that if a landlord's exclusion contravenes statutory or constitutional strictures, such illegality provides a valid defense to an unlawful detainer action. (See Opinion, Petition, Appendix "A", p. 29 and cases cited; compare *Edwards v. Habib* (1968) 130 U.S. App. D.C. 126, 397 F.2d 687, *cert. den.* (1969) 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560.) Therefore, Petitioner is without standing to assert the purported unconstitutionality of a "penalty" to which it has not been and cannot be subjected in this case, nor to rely upon standards for the construction of *criminal* statutes totally inapplicable here.

In sum, Petitioner merely disagrees, for obvious reasons, with the California Supreme Court's interpretation of "reasonableness" as a matter of California law and, as with other perpetrators of discriminatory practices, would prefer to believe that its class-based discrimination in general, and its discrimination against the class of children in particular, should be deemed reasonable—or at least permissible—under the laws of its state, notwithstanding that California, in the exercise of its police power, has prohibited such arbitrary discrimination. Such disagreement by an unsuccessful litigant in state court does not and cannot create a federal question so as to confer jurisdiction

for United States Supreme Court review by certiorari, and the Fourteenth Amendment cannot be used as a vehicle to bring to this Court such unsuccessful litigants' abstract opinions upon the merits of state legislation upon which the lower court's decision is founded. *Davidson v. New Orleans* (1878) 96 U.S. 97, 24 L.Ed. 616.

CONCLUSION

In the absence of any constitutional attack upon the holding of the California Supreme Court, or upon the construction of the California Civil Rights Act, the Petitioner does not present any federal question or constitutional issue of sufficient import to qualify for the United States Supreme Court's review by Writ of Certiorari. Petitioner's failure to meet the burden of demonstrating affirmatively that this Court has jurisdiction to review by certiorari alone requires denial of the Petition. Moreover, as to the one constitutional issue that might have been presented, the record demonstrates not only that Petitioner failed to raise it by timely Petition for Rehearing, so that it has never been presented to or passed upon by the California Supreme Court, but that Petitioner waived the issue by failing to raise it by timely motion at its first opportunity below and submitting itself to the jurisdiction of the California Supreme Court without objection.

For those reasons, the Petition should be denied.

Dated: September 3, 1982

Respectfully submitted,
GRATZ AND STARLER

By EUGENE C. GRATZ, ESQ.
Attorneys for Respondents

APPENDIX A

CALIFORNIA
RULES OF COURT
RULES 15, 27, 28

RULES OF PRACTICE AND PROCEDURE ADOPTED BY THE JUDICIAL COUNCIL AND THE SUPREME COURT

Rule 15. Form of briefs

(a) [Headings, references, index and tables] Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical "assignments of errors" but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record. Every brief shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities.

(b) [Printed brief] Except as provided in this rule, all briefs in civil cases shall be printed. Printed briefs shall comply with the following specifications:

(1) They shall be on opaque, unglazed white paper, 8½ x 11 inches in size, and bound in book or pamphlet form with a suitable cover.

(2) Except for indented quotations and footnotes, the type shall not be smaller than 11-point open fact type with leaded lines. Indented quotations may be printed in unleaded lines, and footnotes may be printed in not smaller than 8-point type and unleaded lines. All headings shall be printed in a type distinguishable from that used in the body.

(3) There shall be a margin of at least one inch on the top, bottom and each side of the type page.

(4) The cover shall contain the title of the case, the name of the trial judge and county, the designation of the

brief, and the name, address and telephone number of the attorney filing the brief.

As amended, eff. Jan. 1, 1951; Jan. 1, 1959; Nov. 11, 1966; July 1, 1968; July 1, 1974; July 1, 1980.

(c) [Briefs produced by other process of duplication] A brief may be produced by other process of duplication as defined in rule 40(l) when it consists of not more than 50 pages, excluding tables and index. An opinion of the Court of Appeal, when annexed to a petition for hearing, shall not be included in ascertaining the total number of pages of the petition. All such briefs shall conform to subdivision (d) of this rule, except that both sides of the paper may be used, with each side numbered as a separate page. When both sides of the paper are used the margin next to the binding shall be at least 1¼ inches and the margin opposite the binding at least one-half inch, and the paper shall be at least 20-pound weight. The type face used in briefs produced by other process of duplication shall not be smaller than that permitted in printed briefs. The clerk shall refuse to file and copies which are not legible. Briefs produced by other duplication process which exceed the limit specified herein, may be filed only when specially permitted by the Chief Justice or Presiding Justice.

Added, eff. July 1, 1974.

(d) [Typewritten brief] Typewritten briefs may be filed only when specially permitted by the Chief Justice or Presiding Justice. All such briefs shall be prepared as provided in subdivision (b) of rule 9, except that the lines on the pages may be unnumbered. Headings shall be either capitalized or underscored or both, and all quotations shall be indented. The briefs shall be bound in appropriate manuscript covers, which shall contain the same matters as the cover of a printed brief; if stapled, the bound edge and the staples shall be covered with tape.

Formerly subd. (c). As amended, eff. Jan. 1, 1959; Jan. 1, 1961; Jan. 1, 1968; July 1, 1971; renumbered subd. (d) and amended, eff. July 1, 1974; as amended, eff. July 1, 1980.

Rule 27. **Rehearing in court rendering decision**

(a) [Power to grant rehearing] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.

As amended, eff. Nov. 11, 1966; Jan. 1, 1957; Jan. 2, 1962; Nov. 11, 1966.

(c) [Time for filing answer] An answer may be served and filed within 23 days after the filing of the decision.

As amended, eff. Jan. 1, 1957.

(d) [Form of petition and answer] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [Determination of petition] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

As amended, eff. Jan. 1, 1961; Nov. 11, 1966.

Rule 28. **Hearing in Supreme Court**[1]

(a) [Time within which court may grant hearing] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision

(b), may order the cause transferred to itself for hearing and decision, and withing the original 30-day period or any extension thereof the Supreme court may for good cause extend the time for one or more additional periods not to exceed a total of an additional 60 days.

As amended, eff. Jan. 1, 1957; Jan. 1, 1959; Jan. 1, 1961; Jan. 2, 1962; Nov. 11, 1966; Jan. 1, 1968.

(b) [Time for filing petition] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When such copy is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

As amended, eff. Jan. 1, 1957; Jan. 1, 1959; Jan. 2, 1962; Nov. 11, 1966; Jan. 1, 1972.

(c) [Time for filing answer] An answer may be served and filed within 20 days after the decision becomes final as to the Court of Appeal.

As amended, eff. Jan. 1, 1957; Jan. 1, 1959; Nov. 11, 1966.

(d) [Form of petition and answer]

(1) Except as provided herein, the petition and answer shall, insofar as practicable, conform to the provisions of rule 15.

(2) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

(3) The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all of his contentions in opposition to the petition. No authorities or argument may be incorporated by reference from another document into the petition, or into the answer, except that the petition or answer may incorporate by reference specified portions of a petition for hearing or answer filed in the Supreme Court by another party in the same case, or filed in the Supreme Court in a connected case wherein a petition for hearing is also pending. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition or answer, except where such annexed material is page-numbered consecutively with the body of the petition or answer and the total length, including the annexed material, does not exceed the limit established in paragraph (4).

(4) A petition or answer shall not exceed 35 pages if printed or 50 pages if typewritten or produced by other process of duplication, exclusive of the Court of Appeal opinion, index of contents and table of authorities, and any other indices. There shall be no exhibits or appendices, however denominated, annexed thereto or filed therewith other than the opinion of the Court of Appeal and any annexed material permitted by paragraph (3), except that, if it is of unusual significance, an evidentiary exhibit or order of a lower court may be annexed if it does not exceed 10 pages. In all other instances, reference to evidentiary matters and lower court orders shall be by appropriate

reference to the record, if they cannot be included in the body of the petition or answer without exceeding the length limitations previously stated. The Chief Justice may permit petitions or answers of greater length, or the inclusion of more annexed material, upon written application.

As amended, eff. Nov. 11, 1966; July 1, 1975.

(e) **[Determination of petition]** A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect.

As amended, eff. Nov. 11, 1966.

(f) **[Oral argument]** When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived or unless the Court transfers the cause to a Court of Appeal.

As amended eff. July 1, 1975; Jan. 1, 1976; Jan. 1, 1980.

APPENDIX B

SUPREME COURT CALENDAR
SPECIAL SAN FRANCISCO SESSION
STATE BUILDING
AUGUST 3, 4, and 5, 1981

The following cases are placed upon a special calendar of the Supreme Court for hearing at its courtroom in the State Building, San Francisco, California, on August 3, 4 and 5, 1981:

MONDAY, AUGUST 3, 1981 - 9:00 A.M.

S.F.	24207	American Civil Liberties Union Foundation of Northern California v. Deukmejian
L.A.	31280	Estate of Black
L.A.	31387	Societa per Azioni de Navigazione Italia v. City of Los Angeles

1:30 P.M.

Crim.	21692	People v. Wright
Crim.	21542	People v. Chavers
L.A.	31162	Maxwell v. Superior Court, County of Los Angeles

TUESDAY, AUGUST 4, 1981 - 9:00 A.M.

S.F.	24279	Samson v. Transamerica Insurance Company
S.F.	24266	Peery v. Superior Court, County of Santa Clara
S.F.	24095	DeLancie v. Superior Court, County of San Mateo

1:30 P.M.

Crim.	21352	People v. Ramos
(Crim.	20943	(People v. Hogan
(Crim.	21582	(Hogan on Habeas Corpus
Crim.	21945	People v. Mirmirani

WEDNESDAY, AUGUST 5, 1981 - 9:00 A.M.

S.F.	24183	People v. Superior Court, County of San Mateo (Valdez)
L.A.	31389	Katz v. Workers' Compensation Appeals Board
L.A.	31384	Hustedt v. Workers' Compensation Appeals Board

1:30 P.M.

Crim.	20705	People v. Stankewitz
Crim.	21136	People v. Haskett
S.F.	24076	Bailey v. Loggins
L.A.	31199	Marina Point, Ltd. v. Wolfson

Bird

Chief Justice

If exhibits are to be transmitted to this court counsel must comply with Rule 10(d), California Rules of Court.

SUPREME COURT CALENDAR

1:30 PM August 5, 1981

TIME

COURTROOM, STATE BUILDING, SAN FRANCISCO

L. A. 31199

MARINA POINT,
Pltf-Resp.

vs.

WOLFSON, ET AL.,
Fdts-Applts.

For Applts:
Eugene C, Gratz 30 Min.

For Resp:
Richard F. Hamlin 30 Min.

The above-entitled case has been set on the Supreme Court Calendar as indicated above.

As Councel have advised, the order in which counsel will argue and the time allotted to each is as indicated above. *If argument is to be divided differently, please immediately so advise this office.*

Sincerely,

LAURENCE P. GILL
Clerk of the Supreme Court

APPENDIX C

LAW OFFICES
GRATZ AND WOLFSON

STEPHEN A. WOLFSON
EUGENE C. GRATZ*
*ALSO MEMBER N.Y. BAR

SUITE 1232
1901 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067

(213) 277-1232
(213) 879-1232

June 23, 1981

Honorable Rose E. Bird
Chief Justice of California
California Supreme Court
4050 State Building
350 McAllister Street
San Francisco, CA 94102

Re: Marina Point, Ltd. v. Wolfson
California Supreme Court, Case No. LA 31199

Honorable Madame:

The above-entitled cause has been set for oral argument on August 5, 1981 at 1:30 p.m.

Information disseminated to the public indicates that the Honorable Otto Kaus has been officially appointed to the Supreme Court of California by Governor Brown, and that his confirmation is anticipated prior to the August term of the Court.

Section 170b of the Code of Civil Procedure provides "No Justice or Judge before whom a cause or question may have been tried or heard, shall sit or act, in an appellate tribunal, on the trial or hearing of such cause or question." Justice Kaus was a member of the panel of Division 5 of the Court of Appeal of the Second Appellate District before which the above-entitled cause was heard,

and participated in the judgment of that Court. It would appear, therefore, that he is disqualified as a matter of law from participating in the determination of the cause by the Supreme Court.

I bring this matter to your attention so that there will be an opportunity for the appointment of a justice pro tem to act in the matter should the Court intend that it be heard by a full panel of seven justices.

Very truly yours,

GRATZ & WOLFSON

By

EUGENE C. GRATZ

ECG:kd

cc: Richard F. Hamlin, Esq.
Amici Curiae

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on September 7, 1982, I served the within *Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

California Supreme Court
4250 State Bldg., 455 Golden Gate Ave.
San Francisco, California 94102

Hon. Judge Harold I. Cherness
Culver Municipal Court
4130 Overland Ave.
Culver City, California 90230

Richard F. Hamlin
4519 Admiralty Way
Suite 208
Marina del Rey, California 90291

Clerk, California Court of Appeal
Second Appellate District
3580 Wilshire Boulevard
Third Floor
Los Angeles, California 90010

Clerk of the Los Angeles Superior Court, Appellate Dept.
111 North Hill Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 7, 1982 at Santa Monica, California.

ROBIN J. McCOLGAN
(Original signed)